Supreme Court, U.S.
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No. 91-1440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SCHNABEL FOUNDATION COMPANY,
Petitioner,

v.

HARBOR INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED*

1. Whether the "sufficiency of the evidence" standard newly adopted by the court of appeals** in reviewing a jury verdict is erroneous when no timely motion for j.n.o.v. was filed in that it (1) conflicts with the rationale of *Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48 (1952); (2) conflicts with the majority of circuits, which correctly adopted the "no evidence" standard; (3) is incompatible with Rule 50(b), Fed. R. Civ. P.; and (4) fails to respect the role of the district court in having the initial opportunity to pass upon a motion for j.n.o.v.

2. Whether the court of appeals erred in disregarding evidence in the record from which a reasonable juror could have found contributory negligence, thereby violating its obligation to *independently* review the *entire* record (*Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Northern Pacific Railway v. North Dakota*, 236 U.S. 585 (1915)), with the consequence that the province of the jury was unconstitutionally invaded in contravention of the Seventh Amendment.

3. Whether the court of appeals unconstitutionally invaded the province of the jury in contravention of

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* Pursuant to Supreme Court Rules 21.1 (b) and 28.1, the following were parties to the proceedings below:

Schnabel Foundation Company
Harbor Insurance Company (as subrogee)
American Insurance Company (as subrogee)
Westminster Investing Corporation (subrogor)
OMNI Construction, Inc. (as subrogor)

** In view of the fact that this case was argued September 6, 1991, and decided on October 15, 1991, petitioner is not able to state whether or not Mr. Justice Thomas was included in the reference to approval by the "entire court." [App. D, n.4 at 43a]

the Seventh Amendment by failing to give effect to an unambiguous jury verdict by which the jury had to have found for the petitioner irrespective of the issue of contributory negligence.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ___

SCHNABEL FOUNDATION COMPANY,

Petitioner,

v.

HARBOR INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition[1] asks this Court to exercise its judicial discretion and review this case. The decision below of the United States Court of Appeals for the District of Columbia Circuit (hereinafter referred to as the "court of appeals" or the "court below") conflicts with decisions of this Court as well as with the decisions of other United States Courts of Appeals. The court below ignored the mandate of Rule 50(b), Fed. R. Civ. P., by applying an erroneous standard

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[1] Your petitioner, Schnabel Foundation Company, a District of Columbia corporation, is a subcontractor that builds sheeting, underpinning and retaining wall systems. Since 1959, Schnabel has completed over 2,000 projects in more than 350 cities. Specializing in the design and construction of earth retaining structures, Schnabel has the distinction of being a national contractor with extensive local knowledge and experience, not only in the District of Columbia, but also in all but seven States. In order to remain as a viable and competitive contractor, over the past 33 years, Schnabel has depended upon certainty and stability in the law of commerce, especially the laws of negligence (professional malpractice) and of contract.

of review of a jury verdict. Even though *no timely* motion for j.n.o.v. or new trial motion was filed, the court of appeals applied the "sufficiency of the evidence" standard that would have been proper if a *timely* motion for j.n.o.v. *had been filed*. The correct standard was the "plain error" doctrine: *i.e.*, whether there was no evidence to support the verdict.

The court of appeals violated the Seventh Amendment by substituting its judgment for that of the jury, as to the facts and all legitimate inferences which may be drawn on a manifestly inadequate and incomplete review of the record.

JUDGMENT, OPINION AND ORDERS BELOW

APPENDIX A: United States District Court For The District Of Columbia, JUDGMENT ON THE VERDICT FOR DEFENDANT Filed July 2, 1990, in *Harbor Insurance Company v. Schnabel Foundation Company*, Civil Action No. 87-2212. [App. A, 1a]

APPENDIX D: OPINION and ORDER Of The United States Court Of Appeals For The District Of Columbia Circuit, Docket No. 90-7122, dated October 15, 1991, in *Harbor Insurance Company v. Schnabel Foundation Company*, 946 F.2d 930 (D.C. Cir. 1991). [App. D, 33a]

APPENDIX E: United States Court Of Appeals For The District Of Columbia Circuit, Docket No. 90-7122, ORDER dated December 9, 1991, denying Schnabel Foundation Company's PETITION FOR REHEARING. [App. E, 48a]

JURISDICTIONAL STATEMENT

The Opinion and Order of the United States Court of Appeals for the District of Columbia Circuit *reversing* the

Judgment On The Verdict entered on July 2, 1990, by the United States District Court for the District of Columbia [App. A, 1a & B, 2a] and *remanding the case for a new trial* was entered on October 15, 1991. [App. D, 33a] A petition for rehearing thereon was denied on December 9, 1991. [App. E, 48a]

Jurisdiction over this matter is conferred upon this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Seventh Amendment To The Constitution of the United States of America states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict[2]

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the

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[2] The court of appeals, however, stated [App. D, 43a]:

> The *Jones* rule creates a *de facto disparity* between *our standard of review* for directed verdict motions and j.n.o.v. motions, a *disparity* that seems especially *unjustified* in light of the *recent change in the Federal Rules* eliminating the difference in terminology between the two. *See id.* (Calling both "motion[s] for judgment as a matter of law"). . . (Emphasis added.)

Your petitioner suggests that the rule set out herein is at all times relevant to this petition and is the rule to be applied to this case. The amendment to Rule 50, now in effect, is also in accord with petitioner's position. Since the court of appeals has wrongly interpreted the amendment now in effect, this case is all the more worthy of review by this court.

close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. . . .

STATEMENT OF THE CASE

A subrogation action was filed under diversity jurisdiction in the United States District Court for the District

of Columbia (hereinafter referred to as the "district court") for property damage to a building (625 Pennsylvania Avenue, N.W.) owned by Sears, Roebuck and Company ("Sears") allegedly related to the construction of an adjoining office building (601 Pennsylvania Avenue, N.W.). The owner of the property ("601") adjoining the Sears' building ("625") is Westminster Investment Corporation ("Westminster"). Westminster's architect and project engineer was Leo A. Daly Company ("Daly"), and its general contractor was OMNI Construction, Inc. ("OMNI"). Plaintiff, Harbor Insurance Company ("Harbor"), the respondent herein, in Civil Action No. 87-2212-HHG, is the excess (umbrella) liability insurance carrier for both Westminster and OMNI. Plaintiff, The American Insurance Company ("American"), in Civil Action No. 87-2211-HHG is the primary liability insurance carrier for both Westminster and OMNI. Both carriers, as subrogees, brought actions to recover monies paid under their respective policies to OMNI on behalf of Westminster for repair of damages which occurred during August-November of 1984 to the Sears building (625) during the construction of the 601 building. The plaintiffs brought these actions against Schnabel Foundation Company ("Schnabel") and three other co-defendants.[3]

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[3] (1) Defendant Daly was the project architect/engineer retained by Westminster under an agreement dated May 21, 1984, which, *inter alia*, required Daly to develop specifications for the project, review and approve the various work and shop drawings of the subcontractors, and represent Westminster by observing the various stages of excavation and construction.

(2) Defendant Hutchinson Brothers Excavating Company, Inc. ("Hutchinson"), was retained under a July 17, 984 subcontract with OMNI to provide excavation services for the site.

(3) Defendant Division Two, Inc. ("Division Two") under a May 15, 1984 subcontract with OMNI agreed to select and provide a dewatering program for the site.

On November 14, 1989, by praecipe, Schnabel's co-defendants—Daly, Hutchinson and Division Two—settled and compromised their case with the plaintiffs whereby the Second Amended Complaint against them

Prior to and during the construction of 601, Westminster and OMNI also sought and received advice from three geotechnical consultants—Schnabel Engineering Associates, Mueser-Rutledge, Johnston & Desimone, and Law Engineering Testing Company. Sears concomitantly also retained consultants: Skidmore Owings & Merrill (structural engineering) and STS Consultants, Ltd. (geotechnical).[4]

After seven days of trial,[5] on the eighth day (July 2, 1990),the jury returned a verdict (App. B, 2a) on both Counts (negligence/professional malpractice and breach of contract/warranty) in favor of Schnabel. Judgments On The Verdict For The Defendant against both plaintiffs, Harbor in 87-2212-HHG (App. A, 1a) and American in 87-2211-HHG, were entered on even date.

Harbor filed an *untimely* motion for j.n.o.v. or, in the alternative, for a new trial. The district court, divested of jurisdiction over these motions, denied them as *untimely filed* and, thus, did not review the record for the "sufficiency of the evidence" underlying the jury's verdict on the grounds raised in Harbor's motions.[6]

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and their cross-claims against each other and Schnabel were dismissed with prejudice.

[4] This Court's attention is now invited to Appendix F (App. F, 49a), Defendant's Exhibit 182, "Construction Organization Chart," which was used extensively throughout the trial.

[5] The seven-day trial against Schnabel, the remaining co-defendant, before The Honorable Harold H. Greene, United States District Judge, and a jury of six with two alternates, commenced on June 21, 1990. Harbor, as plaintiff, presented during the first three days of trial the testimony of seven witnesses, two of whom were qualified as expert witnesses. Harbor introduced 60 exhibits into evidence. Schnabel, as defendant, during the next three days of trial presented the testimony of six witnesses, two of whom were qualified as expert witnesses. Schnabel introduced 16 exhibits into evidence. One of Harbor's expert witnesses returned as a rebuttal witness on the sixth day of trial.

[6] The Record ("Rec.") below (commencing on August 10, 1987 and ending on August 2, 1990), certified on August 2, 1990 to the Clerk of the United States Court of Appeals for the District of Columbia

Harbor[7] appealed the judgment against it to the court of appeals. Harbor in its brief on appeal, *inter alia*, urged that there was insufficient evidence to support Schnabel's claim that Westminster and/or OMNI were contributorily negligent and, thus, that the district court should have granted its motion for a directed verdict at the close of all of the evidence, notwithstanding its failure to file *timely* motions for j.n.o.v. or new trial in the district court. The appeal was argued on September 6, 1991, and decided on October 15, 1991.

The court of appeals, in its opinion and order [App. D, 33a], overturned its own circuit's precedent, *Jones v. Reliance Ins. Co.*, 607 F.2d 1 (D.C. Cir. 1979), which, in accord with seven other circuits, held that, where the appellant has not preserved its directed verdict motion by filing a timely motion for j.n.o.v. in the district court, appellate review is limited to the "plain error doctrine"; i.e., the absence of any evidence to support a jury verdict. Instead of following *Jones*, the court of appeals applied the "sufficiency of the evidence" standard of review to the denial of the directed verdict motion and in so doing limited its review to citations in Schnabel's brief and at oral argument without reviewing the entire record which was before it in accordance with its own local rules.[8]

Circuit by the Clerk of the United States District Court for the District of Columbia consists of a 35-page Docket list containing 226 entries together with documents and eight volumes (Volumes I-VIII, commencing on June 21, and ending on July 2, 1990) of transcripts of trial ("Tr.") numbered seriatim, pages 1-906, and a transcript of a post-verdict status call held on July 11, 1990 ("Status Call Tr."). The Rec. in the court of appeals also consists of an Appendix (pages 1-306) of the Respondent (Plaintiff-Appellant, Harbor) ("Harbor App."), and Appendix of the Petitioner (Defendant-Appellee, Schnabel) ("Schnabel App.") and the September 6, 1991, transcript of oral argument (pages 1-33) before the court of appeals ("C.A. Tr.").

[7] American (in 87-2211-HHG) did not take an appeal from the judgment against it.

[8] Rule 12(a)(2) of the General Rules of the court of appeals states in pertinent part: ". . .Any portion of the record, whether or not included in an appendix, may be relied upon by the parties and by the Court."

Schnabel filed a petition for rehearing, noting that the jury found for Schnabel on both counts, negligence and contract. Under the trial court's instructions, contributory negligence was not a defense to the contract claim. Therefore, the petition for rehearing urged, the jury verdict is unambiguous in deciding in favor of Schnabel irrespective of the issue of contributory negligence. Schnabel also brought to the attention of the court of appeals evidence of OMNI's negligence in its exclusive control over the operation of the dewatering wells and proper supervision of the excavator.

The court of appeals summarily denied the petition for rehearing on December 9, 1991, without addressing any of the issues raised therein.

This petition followed.

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10 of this Court, the reasons for granting this petition are as follows:

1. The court of appeals in this case overruled[9] its own precedent, *Jones v. Reliance Ins. Co.*, 607 F. 2d 1 (D.C. Cir. 1979), a case in harmony in 1979 with the other circuits, which held, *inter alia*, that a failure to file a motion for j.n.o.v. in the district court precludes the court of appeals from reaching the issue of whether the jury's verdict was supported by sufficient evidence. In so doing, the "sufficiency of the evidence" standard of review adopted in this case is in direct conflict with the decisions in the First, Second, Third, Sixth, Seventh, Eighth and Federal Circuits. The correct standard is that the "plain error doctrine" applies when a timely j.n.o.v. motion is not filed. Under the correct standard, a jury verdict can only be

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[9] A panel of the court of appeals noted (n.4) that its decision to overrule *Jones* met with the approval of "the entire court" (which did not review the appellate briefs or the record and did not participate in oral argument). [App. D, 43a]

overturned if there is no evidence (an absence of evidence) to support the verdict.

2. The court of appeals failed to follow the "accepted and usual course of judicial proceedings" by failing to adhere to the dictate of Rule 50(b), Fed. R. Civ. P. This failure resulted from the court of appeals' treatment of a case in which *no* timely motion for j.n.o.v. was filed as if a timely motion *had* been filed. The district court was reversed for an error it did not commit, because no timely motion for j.n.o.v. or for new trial was filed. Furthermore, the court of appeals did not review the entire record as it unfolded to the district court and the jury. Rather, it reviewed only portions of the record, and did not address evidence of record called to its attention by petition for rehearing, filed after the court of appeals changed the Circuit's standard of review. The court refused to permit additional briefing to meet the new standard, first announced by its decision, and which is contrary to that of the majority of other circuits. These departures call for an exercise of this Court's power of supervising its inferior courts.

3. The court of appeals appears to be in conflict with this Court's decisions in two respects. *First*, the court of appeals fails to adhere to Rule 50(b), Fed. R. Civ. P. by the court's adoption of an incorrect standard of review of a jury verdict when no timely motion for j.n.o.v. or new trial is filed. The conflicts with the rationale of *Johnson v. New York N.H., & H.R.*, 344 U.S. 48 (1952); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); *Cone v. West Virginia Pulp Paper Co.*, 330 U.S. 212 (1947); and *Baltimore and Carolina Line v. Redman*, 295 U.S. 654 (1935). Alternatively, this court should settle the issue of the proper standard of review, if any uncertainty exists. *Second*, the court of appeals has violated the Seventh Amendment by failing independently to review the entire record for any evidence of contributory negligence, as mandated by the decisions of this court to vindicate a constitutional right (here the right to trial by jury). *Edmonson v. Leesville Concrete Co., Inc.* 500 U.S. ___, 111

S.Ct. 2077, 114 L. Ed. 2d 660 (1991); *Bose Corp. v. Consumer Union of the U.S., Inc.*, 466 U.S. 485 (1984); *Hodges v. Easton*,106 U.S. 408 (1982); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Fiske v. Kansas*, 274 U.S. 380 (1927); and *Northern Pacific Railway v. North Dakota*, 236 U.S. 585 (1915).

ARGUMENT

I. THE COURT OF APPEALS HAS TAKEN A POSITION IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND HAS ADOPTED AN INCORRECT STANDARD FOR APPELLATE REVIEW OF A JURY VERDICT WHERE NO TIMELY MOTION FOR J.N.O.V. HAS BEEN FILED

A. The Majority Of The Circuits Have Adopted The "No Evidence" Standard Of Review

The appellate court's decision herein to remand for a new trial was based on its conclusion that "the record is devoid of evidence sufficient to warrant a finding of contributory negligence by a reasonable jury." [App. at 47a] In so holding the court specifically overruled *Jones v. Reliance Ins. Company*, 607 F.2d 1 (D.C. Cir. 1979) (*per curiam*) which held that where a party moves for a directed verdict but fails to make a timely motion for j.n.o.v. after the trial, "the District Court's refusal to direct a verdict is grounds for a new trial only if the record reveals a complete absence of evidence to support a jury's verdict." *Id.* at 4.

The District of Columbia Circuit thus has taken a position directly in conflict with decisions of other circuits. *See, e.g. Karajala v. Johhns-Manville Prods. Corp.*, 523 F.2d 155, 157 (8th Cir. 1975) (where appellant moved for a directed verdict and failed to move for a j.n.o.v., the appellate court's review was "strictly limited" and the appellate court "cannot test the sufficiency of the evidence to support the jury's verdict beyond application of the 'plain error' doctrine;" the maximum relief available would have been a new trial which could only have been ordered

had there been "no evidence at all to support the jury's verdict"); *Woods v. National Life and Accident Ins. Co.*, 347 F.2d 760, 769 (3rd Cir. 1965) (a party's failure to file a motion for j.n.o.v. in the trial court precludes an examination of the record by the appellate court for the purpose of ascertaining whether that party was entitled to a directed verdict); *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 810 (1st Cir.) *cert. denied* 488 U.S. 955 (1988) ("We do not reach the issue of the sufficiency of the evidence [to support the jury's finding], however, because plaintiff's counsel failed to move for a judgment notwithstanding the verdict in the district court. Therefore we have no decision of the district court to consider."); *Borger v. Yamaha Intern. Corp.*, 625 F.2d 390, 395 (2d Cir. 1980) (plaintiff "has lost its right to seek appellate review of the adequacy of [plaintiff's] proof" since plaintiff had failed to file a timely j.n.o.v. motion); *see also Hilord Chemical Corporation v. Ricoh Electronics, Inc.*, 875 F.2d 32, 38 (2d Cir. 1989) ("The usual rule moreover, is that appellate courts may not review sufficiency of the evidence claims unless those claims were preserved through motions for directed verdict and j.n.o.v. made at the trial level"); *Charles Jacquin et cie v. Destileria Serralles*, 921 F.2d 467, 475 (3rd Cir. 1990) ("Where a party has failed to move for j.n.o.v., we will not review the sufficiency of the evidence and direct a verdict for them."); *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986) (evidence could not be weighed on appeal because plaintiff had failed to move for a new trial or j.n.o.v.); "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate transcript can impart." (*quoting Cone, supra*); *Continental Cas. Co. v. Howard*, 775 F.2d 876, 883 n.2 (7th Cir. 1985) *cert. denied* 475 U.S. 1122 (1986) ("In light of [plaintiff's] failure to file a motion for a judgment n.o.v. in the district court . . . we are precluded from reaching the issue of whether the verdict . . . was supported by the evidence"); *Edwards*

v. Jewish Hospital of St. Louis, 855 F.2d 1345, 1353 (8th Cir. 1988) (appellant argued that a special interrogatory had not been supported by substantial evidence but appellate court held that appellant "has failed to preserve this allegation of error for review. Our search of the record finds no motion for j.n.o.v. pursuant to Fed. R. Civ. P. 50(b)"). *See also Ward v. Banquet Foods Corporation*, 488 F.2d 141, 142 n.1 (8th Cir. 1973); *Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446, 1453 (Fed. Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985) (party should have filed a Rule 50(b) motion for j.n.o.v. since it wished to challenge sufficiency of evidence supporting particular findings of the jury); *but see, Smith v. Trans World Drilling Co.*, 772 F.2d 157 (5th Cir. 1985).[10]

This Court has issued a line of decisions discussing the constitutionality of directed verdicts in relation to the Seventh Amendment, the practice at common law, and Rule 50 of the Federal Rules of Civil Procedure (*see, e.g., Slocum v. New York Life Insurance Company*, 228 U.S. 364 (1913); *Baltimore and Carolina Line v. Redman*, 295 U.S. 654 (1935); *Berry v. United States*, 312 U.S. 450 (1941); *Galloway v. United States*, 319 U.S. 372 (1943)), and has ruled that when an appellant has moved for a directed verdict but failed to move for a j.n.o.v. following trial, the relief available to the appellant is limited to a new trial. *See, Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48 (1952). However, this Court has not squarely addressed the question of the appropriate standard of review to be applied by the appellate court in deciding whether to grant

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[10] *Smith* holds that all that is needed to enable the losing party to test the sufficiency of the evidence is the making of a directed verdict motion, 772 F.2d at 160. *Smith* absolves the losing party of the need to file a motion for judgment n.o.v. In reaching this conclusion, *Smith* does not even cite, much less discuss, *Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48 (1952), and *Smith* cannot be reconciled with *Johnson*. See discussion below. *Smith* changes the rule previously articulated in *Delchamps, Inc. v. Borkin*, 429 F.2d 415, 417 (5th Cir. 1970), which did cite *Johnson*. The lack of clarity in the Fifth Circuit is further shown in *University Computing Company v. Lykes-Youngstown Corporation*, 504 F.2d 518, 548 (5th Cir. 1974).

a new trial. Accordingly, because the court below is in conflict with the majority of circuits, the standard of appellate review should be clarified.

B. The "No Evidence" Standard Is Correct Because It Respects The Division Of Responsibility Between Appellate And Trial Courts And Gives Proper Significance To The Obligation Of A Party To Make A Timely Motion

The court of appeals cites 9 C. Wright & A. Miller, Federal Practice and Procedure § 2524 at 543 in nn. 30-31 (1971 & Supp. 1991) in an attempt to show that the "vast weight of authority" concerning the appropriate standard of review of directed verdicts is in accord with the standard which it has adopted by overruling *Jones*. [App. D, 42a & 43a] However, the section of Wright & Miller in question, and the cases cited therein, do not deal with or consider the standard to be applied where the party seeking review has made a motion for a directed verdict but has failed to preserve its motion under Rule 50(b), Fed. R. Civ. P., by filing a timely motion for j.n.o.v.

Jones, on the other hand, in support of its ruling cited cases which hold that when a motion for j.n.o.v. has not been filed, the appellate court's review of a directed verdict ruling is strictly limited. *Woods v. National Life & Accident Ins. Co., supra,* 347 F.2d at 769; *Porter v. Eckert,* 465 F.2d 1307, 1309 (5th Cir. 1972); *Karajala v. Johns-Manville Prods. Corp., supra,* 523 F.2d at 157; *Oliveras v. American Export Isbrandtsen Lines, Inc.,* 431 F.2d 814,817 (2d Cir. 1970); 5A Moore's Federal Practice, § 50.12 (2d ed. 1948). In addition, see the decisions of other circuits, cited above. An examination of those cases and decisions of this Court involving directed verdicts shows that the "no evidence" ("absence of evidence;" "plain error") standard is correct.

This court held that the aim of the Seventh Amendment, as applied to directed verdicts, is "particularly to retain the common law distinction between the province of the court and that of the jury, whereby . . . issues of law are

to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." *Redman, supra,* 295 U.S. at 657.

This Court further pointed out in *Redman* that under the common law there was a well-established practice by the trial court of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate disposition of the case through a directed verdict. *Id.* at 659. Because this was a practice at common law, the Seventh Amendment permitted such a practice to continue.

In view of the decision by this Court in *Redman* that under the Seventh Amendment, a directed verdict could be considered following the jury's verdict if the trial court had expressly reserved the right to do so prior to submission of the case to the jury, Rule 50(b), Fed. R. Civ. P., was promulgated so as to make such reservation by the trial court automatic. *See* 5A Moore's Federal Practice ¶50.07[1]. However, Rule 50(b) also requires that a motion for j.n.o.v. must be filed within ten days after the jury verdict in order to allow the trial court to act on such automatic reservation Thus, without a timely motion for j.n.o.v. the trial court is not able to consider a previous motion for directed verdict, since the directed verdict motion has not been preserved.

It is well settled that in the absence of a directed verdict motion, the court of appeals cannot consider the sufficiency of the evidence. As was stated in *Coughlin v. Capitol Cement Co.,* 571 F.2d 290 (5th Cir. 1978):

> In the absence of a motion for directed verdict the sufficiency of the evidence supporting the jury's findings is not reviewable on appeal. . . .*Federal appellate courts simply do not directly review jury verdicts.* . . .[I]nquiry is limited to whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a "manifest miscarriage of justice." (Emphasis supplied, except that emphasis of "any" is in the original.)

571 F.2d at 297.

Coughlin was followed in *Thronson v. Meisels*, 800 F.2d 136, 140 (7th Cir. 1986). It follows that the court of appeals is not able to review sufficiency of the evidence where the directed verdict motion has not been preserved by a timely j.n.o.v. motion,as required by the Federal Rules.[11]

Moreover, this Court, while not explicitly specifying the standard of review to be applied by the appellate court where a motion for j.n.o.v. has not been timely filed, has held that in such circumstances the appellate court cannot direct a verdict, but can, at most, order a new trial. *Johnson v. New York, N.H., & H.R.R., supra; Globe Liquor Co. v. San Roman, supra; Cone v. West Virginia Pulp and Paper Co., supra.*

In *Columbia Plaza Corp. v. Security Nat. Bank*, 676 F.2d 780 (D.C. Cir. 1982), the standard established in considering whether to overturn a jury verdict and grant a new trial was stated as follows:

> . . . the standard of review of a motion for a new trial . . . is not the sufficiency of the evidence, but whether there was a total absence of evidence to support the jury's verdict.

676 at 788.

In reviewing the instant case on appeal, the court of appeals could not do more than order a new trial, and accordingly should have applied "the total absence of evidence" standard of review set forth in *Columbia Plaza* and *Jones, supra.*

In overturning *Jones* the court of appeals has incorrectly invaded the province of the jury by directly reviewing the jury's verdict and weighing the evidence supporting the

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[11] In *Smith v. Trans World Drilling Co., supra*, the Fifth Circuit disagrees with this reasoning. We submit that the majority of the circuits, discussed above, are correct, rather than the Fifth Circuit and the court below. The court below had it right in *Jones* v. *Reliance Ins. Co., supra.*

verdict; whereas, the right of the appellate court to go beyond review for plain error of law and to test the sufficiency of the evidence was lost by respondent's failure to move for a timely j.n.o.v. as required by Rule 50(b).

That this is so is further shown by an examination of the rationale of *Johnson v. New York*, N.H. & H.R.R., *supra*. This Court rejected the contention that a trial judge's express reservation of decision on a motion for a directed verdict relieves a party from any duty whatever under 50(b) to make a motion for judgment after verdict. This Court further noted that Rule 50(b) "rejected the New York procedure in the *Redman* case which permitted judgment to be set aside even though no motion to do so had been filed after verdict." 344 U.S. at 52. This Court went on to say:

> Rule 50(b) as written and construed by us is not difficult to understand or to observe. Rewriting the rule to fit counsel's unexpressed wants and intentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was adopted to end.

344 U.S. at 53.

It is no wonder that Moore states: "This right [i.e., the right of a court to rule on the insufficiency of the evidence when no timely motion for j.n.o.v. is made] is all but eliminated in *Johnson v. New York, N.H. & H.R.R.* . ." 5A Moore's Federal Practice ¶ 50.09 at 50-81. *Johnson* necessarily means that, if a motion for j.n.o.v. is not timely made, appellate review can only be for plain error; the jury verdict must be upheld unless there is no evidence to uphold it; *i.e.* unless a clear miscarriage of justice would result from letting the verdict of the jury stand.[12]

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[12] The instant case brings the point home even more clearly than did *Johnson, supra*. In *Johnson*, the losing party at least asked the trial judge to set aside the verdict. The judge was, therefore aware that the losing party was questioning the verdict. Here, the losing party not only failed to make a timely motion for j.n.o.v., but the losing

The court of appeals' basis for decision is directly contrary to the rationale of *Johnson*. Where *Johnson* makes it critical that a party follow Rule 50(b) and move for j.n.o.v., the court of appeals casually dismisses the need to file postjudgment motions. "[S]uch motions are nowhere made a condition of securing effective appellate review." [App. D, 43a]

The importance of finality in judgments is emphasized by the fact that the Rule 50(b) time limitation is not extendable except under conditions not present here. Providing a strict limitation of time is in disharmony with affording review just as if a timely motion had been made. *See Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957), where a timely motion for j.n.o.v. is filed but not for a new trial, a new trial could not be granted by the district court.[13]

In taking the approach that it can ignore the failure of the losing party to take timely action, the court of appeals overlooks the relationship that should obtain between a reviewing court and the trial court.

A party has the obligation to bring its contention before the trial court. Failing to do so, the only basis for reversal is the determination that plain error has occurred which must be corrected in order to prevent manifest injustice.

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party did not timely move for a new trial. Thus, the district court did not have timely notice that the jury verdict was being challenged at all. Yet the court of appeals sent this case back for a new trial that could last some eight days, on the basis of an "error" which the trial judge did not commit! This is not appellate compliance with Rule 50(b). This violates elementary rules of comity and the principle of conservation of scarce judicial resources. At a time when the criminal case load, under pressure of the Speedy Trial Act, squeezes the time available for civil litigation, it is especially wrong to undo a jury verdict for palpably insupportable reasons.

[13] *Jackson* also is notable for the emphasis the court places on the jury verdict. "The role a jury plays in the dispensation of justice in a trial court is not only not insignificant, but in such a case as this is usually controlling both in the trial court and on appeal." 243 F.2d at 217.

It is the *error of the trial court* that presents grounds for review; if a contention is not timely made to the trial court, there is no error, and there can be no reversal (except within the narrow confines of the plain error doctrine, which is an extremely narrow standard). An appellate court has no warrant to make the requirement of filing a timely motion for j.n.o.v. mere surplusage.

The fundamental principle that "review will normally be confined to matters appropriately submitted for determination in the court of first resort" is well articulated and supported in *Miller v. Avirom*, 384 F.2d 319 (D.C. Cir. 1967). "Sometimes even [this] salutary principle [that questions must be raised in the trial court in the first instance or be lost] must give way in peculiar circumstances, but this is a course to be pursued sparingly and only in exceptional situations." *Id.* at 322 (footnote omitted). Therefore, the court below should have recognized that reversal could be made only on the plain error doctrine—to prevent a clear miscarriage of justice—and not on the same basis as if Rule 50(b) had been complied with and a motion for judgment n.o.v. had been filed.

In conclusion, under the decision of the court below, the trial judge must, in order to avoid the imputation of uncommitted error, rule on an unmade motion for j.n.o.v. If this had been the rule-makers' intention, surely they could have said so, just as they made contingency planning in the event the j.n.o.v. motion is denied under Rule 50(c). The rule could have said: "If no motion for judgment notwithstanding the verdict is made, the court shall nevertheless rule as if such a motion had been made." But *Johnson* holds that the Rule should be applied as written, and so the court of appeals erred in rewriting it. Applying the Rule as written means that where no timely j.n.o.v. motion is filed the only avenue of review is by way of the plain error doctrine to prevent a clear miscarriage of justice. Such review can only be based on the "no evidence" standard.

II. THE COURT OF APPEALS INVADED THE PROVINCE OF THE JURY IN VIOLATION OF THE SEVENTH AMENDMENT BY IGNORING EVIDENCE IN THE RECORD FROM WHICH A REASONABLE JUROR COULD HAVE FOUND CONTRIBUTORY NEGLIGENCE AND BY FAILING TO GIVE EFFECT TO AN UNAMBIGUOUS JURY VERDICT WHICH DID NOT REQUIRE A FINDING ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE

A. The Seventh Amendment Requires An Appellate Court, In Deciding Whether To Overturn A Jury Verdict, To Independently Consider The *Entire* Record

The main thrust of the Seventh Amendment is to seek to preserve a jury verdict. The Amendment sounds the resounding declaration: "[T]he right of trial by jury shall be preserved." This is followed by emphasis and amplification: "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." It is axiomatic that the major premise should be given ample and broad scope, with the limitation upon it narrowly construed.

Only recently the significance of the jury in our system of jurisprudence was emphasized in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. ___, 111 S.Ct. 2077, 2085, 114 L. Ed. 2d 660, 668 (1991) (Case involving peremptory challenges):

> As we noted in *Powers* [*v. Ohio*, 499 U.S. _____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)], the jury system performs the critical governmental functions of guarding the rights of litigants and "insur[ing] continued acceptance of the laws by all of the people." 499 U.S., at _____; 111 S.Ct., at 1369. In the federal system, the Constitution itself commits the trial of facts in a civil case to the jury. Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict. The jury's factual de-

> terminations as a general rule are final. *Basham v. Pennsylvania R. Co.*, 372 U.S. 699 (1963).

So important is the role of a jury and so jealously is it protected that, in *Basham*, cited in *Edmonson* as demonstrating the general finality of jury factual determinations, this Court reversed a state court's decision that set aside a jury verdict for insufficient evidence, even though a total of twelve state court judges on three judicial levels held that the evidence did not warrant submission of the case to the jury. The readiness with which the court of appeals assailed the jury verdict in the instant case bears not even a passing resemblance to decisions like *Basham* and the deeply rooted Constitutional principle they reflect.

The protection of jury verdicts is manifest in our body of Constitutional law. Thus, in the landmark case of *Slocum v. New York L. Ins. Co.*, 228 U.S. 364 (1912), the Court quoted from *Walker v. New Mexico & S.P..R. Co.*, 165 U.S. 593, 596 (1897), as follows:

> Its [Seventh Amendment's] aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions be settled by a jury, and that the court shall not assume direct or indirectly to take from the jury or to itself such prerogative.

228 U.S. at 378.

The importance of the role of the jury—described in *Edmonson*—has frequently been emphasized by this Court. *See Baylis* v. *Travellers' Insurance Co.*, 113 U.S. 316 (1885); *Hodges* v. *Easton*, 106 U.S. 408, 412 (1882). In *Baylis*, this Court stressed: "This constitutional right this court has always guarded with jealousy." 113 U.S. at 321. In another context, this Court recently refused to apply the doctrine of collateral estoppel, because the Court's action was essential to "vindicating [petitioner's] Seventh Amendment rights." *Lytle v. Household Mfg. Co., Inc.*, 494 U.S. 545, 553 (1990).

The ineluctable corollary of the importance of vindicating the right to a jury trial is that an appellate court cannot be stingy and truncated in reviewing the record in determining whether the appellate court should overturn a hard-earned jury verdict. The obligation of the court of appeals to *independently* consider the *entire record* follows from *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), and the cases from which *Bose* derives.

In *Bose*, this Court reiterated the holding of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) that, in certain types of defamation actions involving public officials (and in subsequent cases involving public figures) appellate courts must conduct an independent review of the evidence on the dispositive constitutional issue. This Court quoted from *New York Times* as follows:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that these principles have been constitutionally applied. . . .We must make 'an independent examination of the whole record,' *Edwards v. California*, 372 U.S. 229, 235 (1963), so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. 376 U.S. at 285 (footnote omitted)."

466 U.S. at 508.

Although this Court referred to "free expression," an examination of the source of the obligation referred to in *New York Times* shows that independent examination of the entire record is also necessary to vindicate other federal rights as well.[14] *Edwards*, cited in *New York Times*,

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[14] Reversal of the decision below is required because the court of appeals did not conduct independent examination of the entire record. It is clear that there was evidence of record which was adequate to support the jury verdict under any standard of appellate review. Furthermore, independent examination of the record by this Court to vindicate the Seventh Amendment right to a jury trial—under the same principle that underlies *New York Times*—would necessarily uphold the jury verdict.

relies upon several cases in referring to the duty to make an independent examination of the whole record. One of those is *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). *Fiske* in turn cites, among others, *Northern Pacific Railway v. North Dakota*, 236 U.S. 585 (1915).

In *Northern Pacific*, the Court held:

> This court will review the finding of facts by a state court (1) where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal questions, to analyze the facts.

236 U.S. at 593.

Where the Seventh Amendment right to a jury trial is involved, the federal (i.e., Seventh Amendment) right is to have a verdict upheld if there is evidence to go to the jury. The right is denied if an appellate court upsets a jury verdict where there is evidence warranting submission of the issue to the jury. The First-Fourteenth Amendment freedom of expression right can only be vindicated by independent examination of the entire record to reverse when a finding is without evidence to support it; the Seventh Amendment right to a jury trial can only be vindicated by independent examination of the entire record when a finding *does* have evidence to support it.[15]

The requirement to review the entire record has arisen in the specific context of review of jury verdicts, albeit not in connection with the precise issue addressed here. Thus, in *Carter v. Duncan-Higgins*, 727 F.2d 1225, 1227 (D.C. Cir. 1984), the court held: "necessarily, the reviewing

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[15] For this purpose, it does not matter what the standard is. Whether review is conducted on the "no evidence"/"absence of evidence"/"plain error" standard or the "sufficiency of evidence" standard, we are focusing here on the obligation to independently examine the entire record.

court must consider all the evidence offered." In *Carter* the court also manifested an awareness of the presumption in favor of validity of a jury verdict regrettably absent from the decision below. Thus, in *Carter*, the court held:

> While each piece of circumstantial evidence *alone* might have been an insufficient basis from which to infer discriminatory animus, the cumulative impact of the many discrete instances of disparate treatment and broken promises may have led to an inference of discriminatory intent. Applying common sense and general experience to the hard facts presented, a reasonable juror could have found that the Company treated Carter differently because she was black.

727 F.2d at 1227.

The obligation to review the entire record was also noted in *Boutros v. Riggs Nat. Bank*, D.C., 655 F.2d 1257, 1260-61 (D.C. Cir. 1981) (court reviewed "all the evidence," "the entire record). Although not in terms a Seventh Amendment case, it is interesting that in *Boutros* the court *reversed* the entry of judgment n.o.v., thereby vindicating the right to a jury trial.

In derogation of the principle that the appellate court must *independently* review the *entire* record in order to preserve the Seventh Amendment right to a jury trial, the court below stated:

> We have reviewed in detail all of the evidence of OMNI's supposed contributory negligence that *Schnabel cited in its brief or at oral argument*, but none of it is sufficient to raise an issue for the jury (emphasis added). [App. D, 46a]

This is not an independent review of the entire record. As shown below, there *was* such evidence in the record in addition to the evidence reviewed by the court of appeals from which legitimate inferences could have been made by the jury.

Furthermore, after the court of appeals overruled the *Jones* standard, in its petition for rehearing petitioner ad-

duced evidence in the record that met not only the *Jones* test, but also the erroneous test newly adopted by the court below. Continuing its cavalier disregard of the Seventh Amendment, the court of appeals did not specifically address the evidence raised in the petition for rehearing. Surely the obligation to honor the Seventh Amendment entails more than a mere conclusory and peremptory denial of the petition for rehearing. This is especially so when the court below had just changed the standard of appellate review.

On their face, the items presented in the petition for rehearing show a basis for presenting the issue of contributory negligence to the jury. Yet the court of appeals leaves open to our speculation the reason that it continued to usurp the jury's function.

This Court has stated—though not in the identical situation—that a party "may in suitable situations seek rehearing from the Court of Appeals after his verdict has been reversed." *Neely v. Ely Construction Co.* 386 U.S. 317, 329 (1967). Not only did the court below fail to deal with the specific matters in the petition for rehearing, it did not even grant a request for the opportunity to file an additional brief in light of the overruling of *Jones*.

Moreover, deference to the Seventh Amendment requires that an appellate court pay attention to the dynamics of a trial. In the instant case, after arguments for directed verdicts were made by both sides at the close of all of the evidence, the district court's ruling was as follows:

> The Court: Well, I think both on the negligence and on the defense of contributory negligence these are issues of fact and *neither side has clearly established something that the court would be justified as a matter of law in finding* either that there was no negligence or *that there was no contributory negligence; and at this juncture,* at least, I am going to leave it all to the jury. [Tr. at 836 (Emphasis added)]

The very experienced trial judge, after a seven-day trial, let the issue go to the jury. Moreover, the appellate court did not have the benefit of the trial court's views on a motion for judgment n.o.v. or for a new trial, because no such timely motion was made.

In these circumstances, even though said in dissent, we think instructive the perceptive comments of Mr. Justice Black in *Neely, supra*:

> Appellate tribunals are not equipped to try factual issues as trial courts are. A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold, printed record.

386 U.S. at 337.

Ignoring trial dynamics is a particularly acute denial of Seventh Amendment right when there is no timely motion for judgment n.o.v. or new trial. In such circumstances, the appellate court does not benefit from the trial court's insight into the case. The obligation to tread with care in chancing intrusion into the jury's function is heightened when the losing party has not even, in timely fashion, brought the district court's attention to the challenge to the jury verdict.[16]

B. The Record Contained Evidence Of Westminster/OMNI's Contributory Negligence

Schnabel in its petition for rehearing brought to the attention of the court of appeals evidence of contributory negligence as follows:

1. OMNI had a duty of care to supervise, coordinate and direct the work and that of its subcontractors [Plaintiffs' Exhibit No. 1 at 8].

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[16] Many members of the trial bar doubtless will sympathize with your petitioner, deprived, by a crabbed, narrow reading of a truncated record, of a jury verdict won after a long and complex trial presided over by an able and experienced judge.

2. The Sears building was subjected to serious settlement attributable to dewatering during its own renovation which immediately preceded construction of 601 [Schnabel's witness James Bradford Snidow (Tr. 460)]. OMNI failed to obtain plans of the Sears building renovation project until after the major damage occurred. (Evidence of a negligent omission to thoroughly investigate the status of the adjoining property (625) before setting specifications for subcontractors.) [Harbor's witness, Francis Scott Key (Tr. at 178)]

3. OMNI's exclusive control over the critical dewatering well (No.5). [Harbor's witness William C. Forma (Tr. at 142-43)]

4. Schnabel's expert witness, Edward J. Cording, concluded in his report as follows:

> . . .*Thus it is concluded that a significant portion of the building settlement along the entire wall had to result from causes other than lateral soil movement near the excavation wall.*
>
> From the record, *it is apparent that settlements occurred due to dewatering and that much of the continuing settlement resulted from time-dependent consolidation of the clay.* The proximity of the well to the Sears building wall undoubtedly had a significant effect on the building movements and damage. . . .[Defendant's Exhibit at 24-25; Defendant's Appendix, Tab 1 at 24-25 (emphasis added).]

5. OMNI was responsible for insuring that the excavator properly followed the site plan and slope designs of Schnabel which OMNI had a duty to "stake out" for Hutchinson to follow. [Harbor's witness Francis Scott Key (Tr. at 177-78)]

Schnabel then concluded in its petition for rehearing [pp. 14-15] from the above-referenced evidence in the record as follows:

> The above excerpts and references from the record, which will be more fully developed in the merits brief,

demonstrate that there was a duty of care of OMNI and there is sufficient evidence in this record "to permit a finding that OMNI was contributorily negligent" in the following ways:

(a) Notwithstanding all of the concern of all of OMNI's engineers over the location of Dewatering Well No. 5 prior to construction, OMNI, and no one else, had exclusive control over its operation which proximately caused the damage to the Sears building.

(b) In a construction setting of this type, the one subcontractor that the general contractor exercises constant (daily, if not hourly) supervision and control over is the excavator; and, as indicated OMNI did not properly supervise Hutchinson in the site layout and slope cuts which OMNI "staked out" in accordance with plans.

Thus, the petition for rehearing showed that there was evidence warranting submission of the issue of contributory negligence to the jury. The court of appeals did not specifically address this evidence, even though it had an obligation to consider the entire record, and even though it had announced a new standard of review in its decision.

Moreover, even prior to the petition for rehearing, citations of the record were presented to the court of appeals which showed that there was evidence warranting submission of the issue of contributory negligence to the jury. Examination of the court of appeals' decision shows that the court was engaged in a weighing of the evidence—a jury function.[17]

In addition, Harbor's own counsel admitted that "Mr. Newbauer [Schnabel's Expert Witness] testified that he thought Leo A. Daly's [Daly, the architect, was Westminster's agent] actions were negligent" [Tr. 831-34 (June 29, 1990); *see* Schnabel Brief at 11; Tr. 485-86].

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[17] Perhaps the court below was unduly preoccupied with the "chutzpah" doctrine, with the result that the court tried to make the circumstances of the case fit the "chutzpah" theory, instead of viewing the circumstances on their own merits.

The court of appeals viewed the evidence from afar, and in disjunctive fashion. The jury had the entire case before it, as did the able trial judge. The district court's final statement at trial was:

> Thank you very much. It was a pleasure to have you here, gentlemen, only one side could win and one side had to lose, and I frankly wouldn't have known how to decide it. Thank you. [App. at 31a-32a]

In light of this candid observation of the trial judge and the entire record, it was wrong to overturn the jury verdict.

C. The Court of Appeals Ignored The Jury Instructions Which, If Examined, Would Have Explained Why The Unambiguous Jury Verdict Rendered A Finding Of Contributory Negligence Superfluous

This point was set forth concisely in Schnabel's petition for rehearing as follows [at 5-6]:

> At the outset of its opinion, the court of appeals expressed its dilemma as follows:
>
> "We cannot tell whether the verdict was predicated upon Schnabel's non-negligence or upon OMNI's contributory negligence, because the district court had earlier declined Schnabel's motion to submit a special interrogatory to the jury to determine the basis of a verdict in its favor. . . ." [App. D, 37a]
>
> * * *
>
> In determining that Schnabel was negligent and could only have prevailed on its affirmative defense against OMNI on the basis of its contributory negligence, the Court of Appeals failed to address and give due consideration to the fact that two separate but related theories were put to the jury in this case; that is, negligence and breach of warranty, both requiring causation by Schnabel, and if OMNI succeeded on only

> one of these claims, it would be entitled to recover the full measure of damages claimed. . . .

This Court's attention, in particular, is invited to the apposite portions of the instructions set forth in the district court's charge at Appendix C, App 20a-22a and Schnabel's petition for rehearing concluded on this point as follows [at 8]:

> Suffice it to say that the facts applied to the law by the jury in this case indicate that the work performed by Schnabel did *not cause* the damage to the Sears building, *an essential common element of both claims if the Harbor were to prevail on either one or both.* Thus, *a priori,* this determination by the jury of no causal relationship between the work performed by Schnabel, albeit claimed in negligence or warranty, and the damage to the Sears building renders any consideration by the jury of Schnabel's contributory negligence claim moot, impotent or irrelevant in terms of impeaching the jury's verdict. . . .

CONCLUSION

When no timely motion for j.n.o.v. is filed, the only basis for review of a jury verdict is for plain error; i.e., the "no evidence" standard of review. The court of appeals' use of the "sufficiency of the evidence" standard conflicts with the rationale of *Johnson v. New York, N.H. & H.R.R.*, and the majority of circuits, which have correctly adopted the "no evidence" standard. The decision below is incompatible with Rule 50(b), Fed. R. Civ. P., and does not respect the fundamental principle that alleged error must be presented to the trial court in order to be presented on appeal.

The court of appeals failed independently to review the entire record to ascertain whether there was any evidence of contributory negligence. That court also failed to give effect to the unambiguous jury verdict, by which the jury had to have found for petitioner irrespective of the issue of contributory negligence. In these respects the court of

appeals usurped the role of the jury as decider of the facts, in contravention of the Seventh Amendment.

WHEREFORE, this Court should grant the petition for certiorari.

Respectfully, submitted,

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APPENDIX A:

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL NO. 87-2212

Harbor Insurance Company

Plaintiff

vs.

Schnabel Foundation Company

Defendant

FILED

JUL 2 1990

Clerk, U.S. District Court
District of Columbia

JUDGMENT ON THE VERDICT
(For Defendant)

This cause having been tried by the Court and a Jury, before the Honorable Judge Harold H. Greene, Judge presiding, and the issues having been duly tried and the Jury having rendered its verdict; now therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s) Harbor Insurance Company take nothing on the complaint against the defendant(s) Schnabel Foundation Company and that the said defendant(s) have and recover costs from the said plaintiff(s).

By Delores C. Nathan
JAMES F. DAVEY, Clerk

By Delores C. Nathan
Deputy Clerk

Dated: July 2, 1990

APPENDIX B:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-2212
(HHG)

HARBOR INSURANCE COMPANY,
Plaintiff,

v.

SCHNABEL FOUNDATION COMPANY,
Defendant.

Civil Action No. 87-2211
(HHG)

THE AMERICAN INSURANCE COMPANY,
Plaintiff,

v.

SCHNABEL FOUNDATION COMPANY,
Defendant.

FILED

JUL 2 1990

Clerk, U.S. District Court
District of Columbia

Verdict Form

On the claim of negligence/professional malpractice we find for

_____	X
Plaintiff	Defendant

On the claim of breach of contract/warranty, we find for

_____	X
Plaintiff	Defendant

/s/ Theresa E. Clark
Foreperson

Date: 7/2/90

APPENDIX C:

[825]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 87-2212

HARBOR INSURANCE COMPANY,
PLAINTIFF,

VS.

SCHNABEL FOUNDATION COMPANY,
DEFENDANT.

CIVIL ACTION NO. 87-2211

THE AMERICAN INSURANCE COMPANY,
PLAINTIFF,

VS.

SCHNABEL FOUNDATION COMPANY,
DEFENDANT.

WASHINGTON, D.C.
JUNE 29, 1990
10:15 A.M.

VOLUME VII
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE HAROLD H. GREENE
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

FOR THE PLAINTIFF: ROBERT E. HEGGESTAD, ESQ.

EDWARD CANFIELD, ESQ.

RUSSELL PALATIANOS, ESQ.

JAMES KELLY, ESQ.

FOR THE DEFENDANT: ALEXANDER WHITAKER, ESQ.

OFFICIAL COURT REPORTER: LAURA M. BEASLEY

4800-F U.S. COURTHOUSE

WASHINGTON, D.C. 20001

(202) 371-1843

COMPUTER-AIDED TRANSCRIPTION OF STENOGRAPHIC NOTES

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AFTERNOON SESSION

[879] (JURY PRESENT IN COURTROOM.)

THE COURT: I DIDN'T KNOW THAT THIS DISPUTE ABOUT THE EXCAVATION WAS SO ENTERTAINING.

JURY INSTRUCTIONS

THE COURT: NOW, LADIES AND GENTLEMEN, AS WE TOLD YOU, I AM NOW TO INSTRUCT YOU ON THE LAW. I'LL FIRST GIVE YOU SOME GENERAL INSTRUCTIONS AS TO HOW WE PROCEED AND WHO DOES WHAT, AND THEN IN A FEW MINUTES I WILL GET TO THE SPECIFICS OF THIS CASE.

THE FIRST THING TO KEEP IN MIND IS THAT AS BETWEEN THE JUDGE AND THE JURY THERE IS A SEPARATION OF FUNCTIONS. THE JUDGE DOES SOME THINGS AND YOU DO SOME OTHER THINGS. TOGETHER, IN A SENSE, WE DECIDE WHAT IS TO BE DONE.

THE BASIC DIFFERENCE IS THAT THE JUDGE DECIDES THE LAW AND YOU DECIDE THE FACTS. NOW, I'LL ELABORATE ON THAT A LITTLE BIT. SO FAR AS THE LAW IS CONCERNED, YOU ARE OBLIGATED TO FOLLOW AND COMPLY WITH THE INSTRUCTIONS I GIVE YOU ON THE LAW, BECAUSE I LEARNED THE LAW AND I GUESS YOU DIDN'T. ANYWAY, EVEN IF YOU DO KNOW SOMETHING ABOUT IT, IT'S STILL YOUR OBLIGATION TO FOLLOW MY INSTRUCTIONS ON THE LAW, JUST AS I KEEP ORDER IN THE COURT, AND I TRY TO MOVE THINGS ALONG, AND PASS ON OBJECTIONS AND SO ON, BUT ONE OF THE OTHER THINGS THAT THE COURT DOES IS TO INSTRUCT ON THE LAW.

YOU, ON THE OTHER HAND, ARE THE JUDGES OF THE FACTS. WHAT THAT MEANS, IN A NUTSHELL, IS YOU DECIDE WHAT HAPPENED IN [880] 1984, AUGUST '84 AND NOVEMBER '84, AND BEFORE THEN, AND

WHILE THE CONSTRUCTION WAS GOING ON. DURING ALL THOSE PERIODS YOU HAVE TO DECIDE WHAT HAPPENED. OBVIOUSLY, WE CAN'T GO BACK THERE AND WE CAN'T LOOK INTO WHAT HAPPENED. THERE IS A BUILDING THERE OVER THE EXCAVATION SITE. SO YOU HAVE TO DECIDE WHAT HAPPENED, AND WHO DID WHAT, AND WHO WAS NEGLIGENT OR NOT NEGLIGENT BASED ON THE EVIDENCE. YOU MAKE YOUR DECISIONS AS TO THE FACTS AS THEY APPLY TO THIS CASE STRICTLY ON THE EVIDENCE, ON NOTHING ELSE.

THE EVIDENCE MEANS THE TESTIMONY OF THE WITNESSES FROM THE STAND, ALL THE MANY EXHIBITS THAT WE HAVE SEEN. I REALLY CAN'T THINK OF ANYTHING ELSE THAT WAS IN EVIDENCE. I DON'T THINK THERE WERE ANY DEPOSITIONS THAT WERE READ OR STIPULATIONS—AGREEMENTS—BETWEEN THE PARTIES; THAT'S ALL EVIDENCE. YOU MAKE YOUR DECISION STRICTLY ON THE EVIDENCE AND NOTHING BUT THE EVIDENCE, AND I CAN'T EMPHASIZE THAT TOO MUCH. WHICH MEANS, AMONG OTHER THINGS, THAT IF I SAY ANYTHING ABOUT THE FACTS, YOU AREN'T BOUND BY THAT, BECAUSE I DON'T KNOW ANY MORE BUT THE FACTS THAN YOU DO. I HEARD THEM FOR THE FIRST TIME THE SAME TIME YOU DID. BESIDES, I HAVE NO PARTICULAR RESPONSIBILITY OR OBLIGATION WITH RESPECT TO THE FACTS. IT'S ENTIRELY YOUR DECISION.

SO IF I SAY SOMETHING ABOUT THE FACTS, WHICH I MAY, OR IF I ASKED SOME QUESTIONS WHICH MIGHT LEAD YOU TO BELIEVE THAT I MIGHT FEEL ONE WAY OR THE OTHER ABOUT A PARTICULAR WITNESS OR [881] ABOUT PARTICULAR FACTS, NONE OF THAT IS BINDING ON YOU IN ANY WAY, SHAPE, OR FORM. BECAUSE THE ONLY THING THAT'S BINDING ON YOU IS WHAT I MAY SAY ABOUT THE LAW.-BUT SO FAR AS THE FACTS ARE CONCERNED, YOU ARE THE SOLE JUDGES OF THE FACTS AND YOU MAKE THAT DECISION

ENTIRELY ON THE EVIDENCE AS I HAVE MORE OR LESS SUMMARIZED IT FOR YOU.

IT ALSO MEANS THAT THE ARGUMENTS OF THE LAWYERS ARE NOT EVIDENCE. THEY MAKE THEIR ARGUMENTS, AS THEY SHOULD, TO TRY TO PERSUADE YOU, AS THEY VIEW THE EVIDENCE, HOW THINGS SHOULD COME OUT, BUT THAT IS NOT EVIDENCE AND IT'S THEREFORE NOT BINDING ON YOU IN ANY WAY AS TO WHAT REALLY HAPPENED HERE.

NOW, WHEN YOU DO MAKE YOUR DECISION, AS YOU WILL IN A FEW MINUTES, YOU SHOULD ATTEMPT TO COME UP WITH A VERDICT THAT IS UNANIMOUS BECAUSE WE CAN ONLY ACCEPT VERDICTS THAT ARE UNANIMOUS. IN OTHER WORDS, PLEASE DON'T GO IN THERE AND SAY I'VE MADE UP MY MIND, I WON'T LISTEN TO ANYTHING ANYBODY ELSE HAS TO SAY; THAT'S NOT THE IDEA. THE IDEA THAT WE HAVE A NUMBER OF PEOPLE ON THE JURY IS THAT THEY WILL DELIBERATE AND WILL TALK TO EACH OTHER AND WILL SOMEHOW TRY TO COME UP WITH A VERDICT THAT IS THE VERDICT OF ALL THE PEOPLE WHO ARE ON THE JURY.

IT DOESN'T MEAN YOU SHOULD GIVE UP YOUR HONEST CONVICTIONS AS TO WHAT HAPPENED HERE AND WHAT THE FACTS SHOW, BUT YOU SHOULD GO IN THERE WITH A VIEW TO COMING TO A DECISION THAT YOU CAN ANNOUNCE AS THE DECISION OF THE JURY. YOU SHOULD DELIBERATE, AND YOU SHOULD TALK ABOUT IT. I MIGHT SAY, BEFORE I [882] FORGET IT, THAT YOU CAN HAVE THE EXHIBITS ANY TIME YOU WANT THEM—SOME OF THEM, ALL OF THEM. I'LL SEND ALL OF THE EXHIBITS IN ANY TIME YOU WANT THEM, AND YOU CAN LOOK AT THEM AND STUDY THEM AS MUCH AS YOU WANT TO, AND THAT'S PART OF YOUR DECISION. OBVIOUSLY, WE CAN'T HAVE THE WITNESSES COME BACK AND SO YOU'LL HAVE TO RELY

ON YOUR MEMORY AS TO THEM. BUT AS TO THE EXHIBITS, YOU MAY HAVE THEM IN THE JURY ROOM. YOU CAN CONSULT THEM AS MUCH OR AS LITTLE AS YOU WANT TO.

NOW, THE CHARGE SHOULD BE CONSIDERED—THIS CHARGE, THE INSTRUCTION—SHOULD BE CONSIDERED AS A WHOLE. I DON'T MEAN TO EMPHASIS ONE PART OF THE CHARGE MORE THAN ANOTHER. SOME OF THEM COME MORE LOGICALLY AT THE BEGINNING AND SOME AT THE END. THEY ARE ALL OF EQUAL IMPORTANCE. YOU SHOULD CERTAINLY NOT LET SYMPATHY FOR ONE SIDE OR THE OTHER, OR PREJUDICE, OR PASSION, INFLUENCE YOUR VERDICT. THE MERE FACT THAT ONE LITIGANT MAY BE BIGGER OR HAVE MORE MONEY OR LESS MONEY OR WHATEVER—THAT'S ALL IRRELEVANT. WHAT YOU CONSIDER IS WHO IS RIGHT ON THE FACTS, WHO IS RIGHT ON THE EVIDENCE.

NOW, I DID SAY SOMETHING ABOUT THE EVIDENCE, JUDICIAL NOTICE, TESTIMONY OF WITNESSES, EXHIBITS, AND THE STIPULATIONS THAT COUNSEL HAVE AGREED TO. YOU'RE NOT LIMITED SOLELY TO THE EVIDENCE IN THE SENSE OF SOMETHING THAT'S RIGHT BEFORE YOU. YOU MAY ALSO CONSIDER REASONABLE INFERENCES THAT SUGGEST THEMSELVES IN THE LIGHT OF YOUR OWN EXPERIENCE, THAT IS, A DEDUCTION OR A CONCLUSION WHICH REASON AND COMMON SENSE LEADS YOU TO MAKE FROM [883] THE FACTS WHICH HAVE BEEN PROVED. YOU CAN CONSIDER ALL OF THAT AS WELL AS THE SPECIFIC ITEMS OF EVIDENCE THEMSELVES.

WHEN YOU MAKE YOUR DECISION AS TO THE FACTS, YOU'RE NOT LIMITED TO THE EVIDENCE PRODUCED BY THE PARTICULAR SIDE THAT YOU'RE CONSIDERING. IN OTHER WORDS, YOU CAN TAKE SOME OF THE WITNESSES WHO HAVE TESTIFIED FOR THE PLAINTIFF, AND IF YOU FEEL THAT SOME OF IT SUP-

PORTS THE DEFENDANT, BY ALL MEANS YOU CAN CONSIDER THAT, OR IF THE WITNESSES FOR THE DEFENDANT SAY SOMETHING THAT YOU THINK HELPS THE PLAINTIFF, YOU MAY DO THAT. ALL THE EVIDENCE IS BEFORE YOU AND YOU CAN CONSIDER ALL OF IT TOGETHER.

DIRECT AND CIRCUMSTANTIAL EVIDENCE IS SOMETHING THAT COMES UP BECAUSE PEOPLE HAVE HEARD ABOUT IT OR SEEN IT ON TELEVISION, IN THE MOVIES. THERE IS NO DIFFERENCE AS TO THE WEIGHT TO BE GIVEN TO DIRECT AND CIRCUMSTANTIAL EVIDENCE. THEY ARE BOTH ENTITLED TO EQUAL WEIGHT IF THEY ARE PERSUASIVE TO YOU, OF COURSE.

NOW, DIRECT EVIDENCE IS WHEN SOMEBODY TESTIFIES WHO HAS ACTUAL KNOWLEDGE OF SOME FACT. THAT'S DIRECT EVIDENCE OF THAT FACT. CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF FACTS OR CIRCUMSTANCES FROM WHICH THE EXISTENCE OF A FACT CAN BE ASCERTAINED. AN EXAMPLE THAT WE GIVE IS IF YOU LOOK OUT THE WINDOW—WE DON'T HAVE A WINDOW HERE, BUT IF YOU HAD A WINDOW AND YOU LOOKED OUT AND SAW. IT RAINING, THAT WOULD BE DIRECT EVIDENCE IT WAS RAINING. IF YOU HAD TWENTY PEOPLE COMING IN 884 THIS COURTROOM ALL WITH RAINCOATS ON AND UMBRELLAS, THAT WOULD BE CIRCUMSTANTIAL EVIDENCE THAT IT WAS RAINING, AND YOU CAN CONSIDER THAT AS WELL AS THE DIRECT EVIDENCE.

NOW, ONE OF THE MAIN THINGS TO BE CONSIDERED, AND THAT YOU HAVE TO DO AS JURORS, IS TO JUDGE THE CREDIBILITY OF THE WITNESSES. IN THIS TRIAL, AS IN MOST TRIALS, THE WITNESSES FOR THE TWO SIDES SAY DIFFERENT THINGS, AND SOMETIMES IT'S MORE BLATANT THAN IN OTHERS. HERE IT WAS A LITTLE MORE MUTED. BASICALLY, IT'S STILL YOUR JOB

TO DECIDE WHOM TO BELIEVE AND HOW MUCH TO BELIEVE.

IT'S ENTIRELY YOUR FUNCTION TO JUDGE THE CREDIBILITY OF THE WITNESSES. YOU DO THAT ON THE BASIS NOT OF ANY LEGAL PRINCIPLES THAT I COULD GIVE YOU; YOU DO IT ON THE BASIS OF COMMON SENSE AND OF EXPERIENCE. YOU'VE DEALT WITH PEOPLE AND SOMETIMES YOU'VE BELIEVED THEM AND SOMETIMES YOU HAVEN'T BELIEVED THEM. WELL, YOU BRING THAT SAME EXPERIENCE, THAT SAME COMMON SENSE WITH YOU TO THIS COURTROOM.

YOU CAN CONSIDER SUCH THINGS AS THE DEMEANOR OF THE WITNESS ON THE STAND; THE MANNER IN WHICH HE OR SHE TESTIFIED; WHETHER THE PERSON STRIKES YOU AS HAVING AN ACCURATE MEMORY; DOES THE WITNESS HAVE ANY INTEREST IN THE OUTCOME OF THE CASE; DOES HE HAVE ANYTHING TO WIN OR TO LOSE AS A RESULT OF IT; HOW REASONABLE IS THE WITNESS'S TESTIMONY, HOW UNREASONABLE IS IT; HOW PROBABLE, HOW IMPROBABLE. ALL THOSE THINGS THAT I THINK WOULD SUGGEST THEMSELVES TO YOU ANYWAY ARE THINGS THAT YOU MAY
885 CONSIDER IN JUDGING THE CREDIBILITY OF THE WITNESSES. BUT THE BOTTOM LINE IS IT'S YOUR JOB TO DETERMINE WHICH WITNESS TO BELIEVE AND WHAT PART OF THEIR STORIES TO BELIEVE, AND NO ONE WILL SECOND-GUESS YOU ON IT.

WE HAD A NUMBER OF EXPERTS. I CHARGE YOU, AS I THINK I TOLD YOU IN CONNECTION WITH THE TESTIMONY OF ONE OF THE EXPERTS, THAT A PERSON WHO BY EDUCATION OR EXPERIENCE OR STUDY HAS BECOME AN EXPERT IN AN ART OR A SCIENCE OR A PROFESSION MAY TESTIFY AS TO THOSE MATTERS; AND HE CAN DO MORE THAN JUST GIVE FACTS WITH WHICH HE'S PERSONALLY ACQUAINTED. HE CAN GIVE OPINIONS ABOUT THOSE THINGS. THOSE OPINIONS ARE

VALID EVIDENCE THE SAME AS THE FACTS WHICH OTHER WITNESSES TESTIFIED TO.

YOU'RE NOT BOUND BY THE TESTIMONY OF AN EXPERT ANYMORE THAN YOU ARE BOUND BY THE TESTIMONY OF ANY OTHER WITNESS. YOU GIVE TO THE TESTIMONY OF AN EXPERT, AGAIN, JUST AS MUCH WEIGHT AS YOU THINK, IN LIGHT OF HIS CREDIBILITY, IN LIGHT OF HIS LEARNING, IN LIGHT OF WHETHER WHAT HE SAID MADE SENSE, AS YOU THINK IT IS ENTITLED TO RECEIVE.

NOW, WE HAD A CONFLICT HERE—EXPERTS ON BOTH SIDES—WHICH IS ALSO NOT UNUSUAL. THERE AGAIN, YOU MAKE YOUR DECISION ON THEIR CREDIBILITY, ON THE QUALIFICATIONS OF THE PARTICULAR EXPERT, HOW MUCH WEIGHT SHOULD YOU GIVE THEM, WHETHER THE REASONS WHICH THEY GAVE COMPORT WITH THE EVIDENCE IN THE CASE, WHETHER THEY ARE CONSISTENT WITH WHAT THE REST OF THE TESTIMONY WAS. AGAIN, YOU USE YOUR OWN JUDGMENT AS TO WHAT YOU BELIEVE 886 AND WHAT YOU UNDERSTAND IS REASONABLE INSOFAR AS THE EXPERT IS CONCERNED. SOME OF IT IS PRETTY TECHNICAL, AND WE—AT LEAST I DIDN'T UNDERSTAND IT ALL NECESSARILY. BUT STILL YOU HAVE THE JOB OF ATTEMPTING, AS BEST YOU CAN, TO MAKE A DECISION AS TO WHICH SET OF EXPERTS TO BELIEVE AND WHICH SET OF EXPERTS, WHERE THERE IS A CONFLICT, TO DISBELIEVE.

OBVIOUSLY, THE NUMBER OF WITNESSES DOESN'T MAKE ANY DIFFERENCE. HERE THE NUMBER OF WITNESSES WERE APPROXIMATELY EQUAL; I CAN'T REMEMBER EXACTLY. SOMETIMES YOU HAVE TWENTY WITNESSES ON ONE SIDE AND ONE OR TWO ON THE OTHER. THAT OBVIOUSLY IS NOT DECISIVE. IT'S THE QUALITY OF THE EVIDENCE AND NOT THE QUANTITY OF THE EVIDENCE THAT'S IMPORTANT.

THERE WERE—TO SOME EXTENT, NOT THAT MUCH—PRIOR STATEMENTS WHICH SOME OF THE WITNESSES HAD MADE IN DEPOSITIONS WHICH THEY HAD GIVEN IN LAWYERS' OFFICES EARLIER THIS YEAR OR SOME YEARS AGO. I CHARGE YOU THAT THE TESTIMONY OF A WITNESS MAY BE DISCREDITED OR IMPEACHED BY SHOWING THAT HE'S PREVIOUSLY MADE STATEMENTS WHICH ARE INCONSISTENT WITH HIS PRESENT TESTIMONY. THE PRIOR STATEMENTS ARE ADMITTED ONLY ON THAT ISSUE—CREDIBILITY—WHETHER THE WITNESS'S PRESENT TESTIMONY MAY WHICH DISBELIEVED BECAUSE HE SAID SOMETHING ELSE AT SOME OTHER TIME—AN EARLIER TIME USUALLY—AT A TIME WHEN PERHAPS THE EVENTS WERE FRESHER IN HIS MIND THAN THEY ARE TODAY. AGAIN, I KEEP REPEATING, IT'S UP TO YOU TO DETERMINE HOW MUCH CREDENCE TO GIVE TO A WITNESS, BUT YOU MAY CONSIDER THE FACT THAT HE MAY 887 HAVE GIVEN A DIFFERENT STORY AT SOME OTHER TIME THAN IN THIS TRIAL.

NOW, THE LAST LAST THING, BEFORE I GET TO MORE SPECIFICS, IS THE QUESTION OF THE BURDEN OF PROOF. THE PARTY WHO ASSERTS THE AFFIRMATIVE OF AN ISSUE HAS THE BURDEN OF PROVING IT, AND THAT BURDEN HE MUST GENERALLY CARRY BY WHAT IS CALLED A PREPONDERANCE OF THE EVIDENCE. I SHOULD SAY RIGHT HERE THAT ON ALL MATTERS PERTAINING TO THIS TRIAL, EXCEPT CONTRIBUTORY NEGLIGENCE—WHICH I WILL EXPLAIN IN A MOMENT— THE PLAINTIFF HAS THE BURDEN OF PROOF. ON CONTRIBUTORY NEGLIGENCE, WHICH IS A DEFENSE WHICH HAS BEEN ASSERTED, THE DEFENDANT HAS THE BURDEN OF PROOF. BUT ON EVERYTHING ELSE, THE PLAINTIFF HAS THE BURDEN OF PROOF.

NOW, HE MUST CARRY THAT BURDEN, AS I SAID, BY A PREPONDERANCE OF THE EVIDENCE. PREPONDERANCE OF THE EVIDENCE DOESN'T MEAN SUCH PROOF

AS PRODUCES AN ABSOLUTE OR MATHEMATICAL CERTAINTY OR EVEN SUCH PROOF AS WE HAVE IN CRIMINAL CASES WHERE MATTERS MUST BE PROVED BEYOND A REASONABLE DOUBT. THE PLAINTIFF, ON MOST OF THE ISSUES, MUST PROVE THE MATTERS THAT HE ADVANCES—THE PROPOSITIONS THAT HE ADVANCES—BY A PREPONDERANCE OF THE EVIDENCE, WHICH MEANS SUCH EVIDENCE AS WHEN WEIGHED AGAINST THAT OPPOSED TO IT HAS THE MORE CONVINCING FORCE. AGAIN, IT'S A QUESTION OF QUALITY AND NOT QUANTITY.

TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE MEANS TO PROVE THAT SOMETHING IS MORE LIKELY SO THAN NOT SO. [888] PREPONDERANCE OF THE EVIDENCE MEANS, AS APPELLATE COURTS HAVE INSTRUCTED US, SUCH EVIDENCE AS WHEN CONSIDERED AND COMPARED WITH THAT OPPOSED TO IT HAS THE MORE CONVINCING FORCE. A PARTY HAS SUCCEEDED IN CARRYING THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE IF, AFTER CONSIDERATION OF ALL THE EVIDENCE IN THE CASE, THE EVIDENCE FAVORING HIS SIDE OF THE ISSUE IS MORE CONVINCING TO YOU AND CAUSES YOU TO BELIEVE THAT ON THAT ISSUE THE PROBABILITY OF PROOF FAVORS THAT PARTY. IF YOU BELIEVE THAT ON A PARTICULAR ISSUE THE EVIDENCE AND THE QUALITY OF THE EVIDENCE IS EVENLY DIVIDED, THEN YOU MUST FIND ON THAT QUESTION AGAINST THE PARTY HAVING THE BURDEN OF PROOF. NOW, SO MUCH FOR GENERAL INSTRUCTIONS. NOW WE GET TO SOMETHING A LITTLE MORE SPECIFIC.

AS I'M SURE YOU KNOW BY NOW, THIS CASE INVOLVES A CONSTRUCTION CONTRACT. YOU HEARD REFERENCE TO THE OWNER WESTMINSTER INVESTMENT, THE GENERAL CONTRACTOR OMNI CONSTRUCTION, AND THE SHEETING AND SHORING SUBCONTRACTOR SCHNABEL FOUNDATION CORPORA-

TION. YOU'RE ENTITLED TO ASSUME THAT ANY OBLIGATIONS THAT OMNI OWED TO WESTMINSTER, THE OWNER, WITH RESPECT TO SHEETING AND SHORING WERE ASSUMED BY SCHNABEL FOUNDATION COMPANY UNDER ITS SUBCONTRACT WITH OMNI.

NOW, THE PLAINTIFFS IN THIS ACTION, WHICH MAKES IT A LITTLE MORE COMPLICATED, ARE HARBOR INSURANCE COMPANY AND THE AMERICAN INSURANCE COMPANY, AND THEY ARE HERE BECAUSE THEY WERE THE INSURANCE COMPANIES THAT INSURED THE GENERAL CONTRACTOR OMNI [889] CONSTRUCTION, CERTAINLY AT THE TIME WHEN THIS INCIDENT OCCURRED. AS A RESULT OF THE INCIDENT, A CLAIM WAS PRESENTED BY OMNI AND WESTMINSTER, AND MONEYS WERE PAID BY THE INSURANCE COMPANIES TO OMNI AND WESTMINSTER BY HARBOR AND AMERICAN INSURANCE COMPANIES. AS A RESULT OF THAT, AS THE INSURERS OF OMNI AND WESTMINSTER, HARBOR INSURANCE COMPANY AND AMERICAN INSURANCE COMPANY—THE PLAINTIFFS—CAN ASSERT ANY CLAIMS WHICH OMNI AND WESTMINSTER COULD HAVE ASSERTED AGAINST SCHNABEL. THEY PAID, AND THEREFORE THEY TOOK OVER THE CLAIMS THAT SCHNABEL WOULD HAVE HAD. THEY STAND IN THE SHOES OF OMNI AND WESTMINSTER JUST AS IF OMNI AND WESTMINSTER HAD BROUGHT THIS SUIT; IT'S JUST THE INSURANCE COMPANY, HAVING PAID OFF, TOOK OVER THEIR CLAIMS. AT THE SAME TIME, TO TAKE THE OTHER SIDE OF IT, ANY DEFENSES WHICH SCHNABEL MAY HAVE AVAILABLE AGAINST OMNI AND WESTMINSTER ARE ALSO AVAILABLE AGAINST THE TWO INSURANCE COMPANIES WHO ARE THE PLAINTIFFS IN THIS CASE.

NOW, THAT GETS US TO WHAT ARE THE SPECIFICS OF—ON WHAT BASIS THIS SUIT IS BEING BROUGHT, AND THE SUIT IS ONE FOR NEGLIGENCE, BASICALLY, ALTHOUGH THERE IS SOMETHING ELSE WHICH I'LL COME

TO IN A MOMENT ABOUT BREACH OF CONTRACT AND WARRANTY. THE BASIC LAWSUIT IS FOR NEGLIGENCE, AND I SHOULD DEFINE NEGLIGENCE FOR YOU.

NEGLIGENCE IS THE FAILURE TO EXERCISE ORDINARY CARE. NEGLIGENCE IS DOING SOMETHING WHICH A PERSON USING ORDINARY CARE WOULD NOT DO OR NOT DOING SOMETHING WHICH A PERSON USING [890] ORDINARY CARE WOULD DO. ORDINARY CARE MEANS THAT CAUTION, ATTENTION, OR SKILL A REASONABLE PERSON WOULD USE UNDER SIMILAR CIRCUMSTANCES. A REASONABLE PERSON CHANGES HIS CONDUCT ACCORDING TO THE CIRCUMSTANCES AND ACCORDING TO THE DANGER HE OR SHE KNOWS OR SHOULD KNOW EXISTS. AS THE DANGER INCREASES, A REASONABLE PERSON OBVIOUSLY ACTS MORE CAREFULLY.

ON THE OTHER HAND, THE STANDARD OF CARE IS THAT EXERCISED BY A PERSON USING ORDINARY CARE RATHER THAN EXERCISED BY A PERSON USING EXTREME CAUTION OR EXCEPTIONAL SKILL. WHILE EXCEPTIONAL SKILL IS TO BE ADMIRED AND ENCOURAGED, THE LAW DOES NOT DEMAND IT AS A GENERAL STANDARD OF CONDUCT.

NOW, HAVING INSTRUCTED YOU JUST MOST GENERALLY ON NEGLIGENCE, I NOW WANT TO GET A LITTLE MORE SPECIFIC, AND THAT IS WHILE IT'S AN ACTION IN NEGLIGENCE, IT'S MORE SPECIFICALLY AN ACTION FOR PROFESSIONAL MALPRACTICE AGAINST SCHNABEL FOUNDATION. SCHNABEL FOUNDATION IS, OF COURSE, A PROFESSIONAL ENGINEERING FIRM THAT SPECIALIZES IN DESIGNING AND BUILDING EARTH RETENTION SYSTEMS, COMMONLY REFERRED TO AS SHEETING AND SHORING.

PLAINTIFFS CLAIM THAT THE DEFENDANT SCHNABEL FAILED TO DESIGN AND BUILD SHEETING AND SHORING FOR THIS CONSTRUCTION PROJECT WITH THAT DEGREE OF SKILL, CARE, AND KNOWLEDGE RE-

QUIRED OF A SHEETING AND SHORING PROFESSIONAL ACTING IN THE SAME AND SIMILAR CIRCUMSTANCES, AND THAT THIS FAILURE TO USE THAT DEGREE OF SKILL, CARE, AND KNOWLEDGE CAUSED THE INJURY OR DAMAGE TO THE SEARS BUILDING WHICH ADJOINED THE CONSTRUCTION SITE.

[891] YOU ARE FURTHER INSTRUCTED THAT THE DEGREE OF SKILL, CARE AND LEARNING WHICH A SHEETING AND SHORING PROFESSIONAL IS REQUIRED TO HAVE AND USE IS THAT DEGREE OF SKILL AND CARE AND LEARNING ORDINARILY POSSESSED AND USED BY MEMBERS OF HIS PROFESSION IN THE SAME LINE OF PRACTICE, ACTING IN THE SAME OR SIMILAR CIRCUMSTANCES. THAT'S WHERE THE TESTIMONY OF THE EXPERT WITNESSES COMES IN.

A SHEETING AND SHORING PROFESSIONAL IS NOT NEGLIGENT SIMPLY BECAUSE HIS EFFORTS ARE NOT SUCCESSFUL. YOU ARE INSTRUCTED THAT UNSATISFACTORY RESULTS ALONE DO NOT DETERMINE WHETHER THE DEFENDANT WAS NEGLIGENT IN DESIGNING AND BUILDING THE EARTH RETENTION SYSTEM. HOWEVER, IF SCHNABEL'S FAILURE TO HAVE OR USE THAT DEGREE OF SKILL, CARE, AND LEARNING ORDINARILY POSSESSED AND USED BY SHEETING AND SHORING PROFESSIONALS PRACTICING IN THESE KINDS OF CIRCUMSTANCES IS THE PROXIMATE CAUSE OF THE INJURY OR DAMAGE, IT IS NOT A DEFENSE TO A CHARGE OF NEGLIGENCE THAT THE DEFENDANT JUST DID THE BEST HE COULD AND THAT THOSE EFFORTS SIMPLY WERE NOT SUCCESSFUL. IN OTHER WORDS, HE'S NOT REQUIRED TO BE SUCCESSFUL. THE MERE FACT THAT HE WASN'T SUCCESSFUL DOESN'T PROVE THAT HE WAS NEGLIGENT. ON THE OTHER HAND, IF IT TURNS OUT THAT THE DEFENDANT WAS NEGLIGENT, THE MERE FACT THAT HE DID THE BEST HE COULD WOULD NOT BE A DEFENSE. THOSE ARE THE TWO SIDES OF THE SAME COIN.

YOU MUST DETERMINE THE STANDARD OF PROFESSIONAL LEARNING, SKILL, AND CARE OF THE DEFENDANT SCHNABEL ONLY FROM [892] THE OPINIONS OF THE VARIOUS EXPERT WITNESSES WHO HAVE TESTIFIED ON THOSE STANDARDS; AND THEY HAVE TOLD US WHAT THE STANDARDS ARE AND HOW A SHEETING AND SHORING PROFESSIONAL SHOULD ACT UNDER THESE CIRCUMSTANCES—WHAT HE SHOULD KNOW AND WHAT HE SHOULD DO. YOU SHOULD CONSIDER EACH SUCH OPINION AND WEIGH THE QUALIFICATIONS OF THE WITNESSES AND THE REASONS WHICH EACH GAVE FOR THEIR OPINIONS. YOU SHOULD GIVE TO EACH OPINION THE WEIGHT TO WHICH YOU DEEM IT ENTITLED.

YOU MUST RESOLVE ANY CONFLICT IN THE TESTIMONY OF THE WITNESSES BY WEIGHING EACH OF THE OPINIONS EXPRESSED AGAINST THE OTHERS, TAKING INTO CONSIDERATION THE LOGIC OF THE REASONS GIVEN BY THE EXPERT FOR HIS OPINION, THE FACTS RELIED ON BY THE WITNESS, WHETHER HE HAS AN INTEREST IN THE OUTCOME OF THE LAWSUIT, HIS RELATIVE CREDIBILITY, HIS SPECIAL KNOWLEDGE, HIS SKILL, HIS EXPERIENCE, HIS TRAINING AND EDUCATION.

NOW, THE MERE FACT THAT SOMEBODY IS NEGLIGENT DOESN'T NECESSARILY MEAN THAT THAT PERSON IS ALSO LIABLE, THAT IS, THAT HE LOSES IN THIS LAWSUIT. IN ADDITION TO NEGLIGENCE, THE PLAINTIFF MUST ALSO SHOW THAT THE NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE INJURY. AN INJURY OR DAMAGE IS SAID TO HAVE BEEN PROXIMATELY CAUSED BY AN ACT OR FAILURE TO ACT WHENEVER IT APPEARS FROM A PREPONDERANCE OF THE EVIDENCE THAT THE ACT OR OMISSION PLAYED A SUBSTANTIAL PART IN BRINGING ABOUT THE INJURY OR DAMAGE. IT MUST BE SHOWN THAT THE INJURY OR DAMAGE WAS EITHER A DIRECT RESULT OR A REA-

SONABLY PROBABLE CONSEQUENCE OF [893] THE ACT OR OMISSION.

NOW, THERE MAY BE SEVERAL CAUSES SOMETIMES OF INJURIES OR DAMAGE—THERE ARE SEVERAL NEGLIGENT ACTS WORKING TOGETHER CAUSING A PARTICULAR INJURY OR DAMAGE. EACH PERSON WHOSE NEGLIGENT ACT IS A CAUSE OF AN INJURY IS RESPONSIBLE. IT'S NO DEFENSE THAT SOME OTHER PERSON NOT JOINED AS A DEFENDANT IN THIS ATION PARTICIPATED IN CAUSING THE INJURY EVEN IF IT SHOULD APPEAR TO YOU THAT THE NEGLIGENCE OF THE OTHER PERSON WAS GREATER.

THE APPLICATION THAT THIS MAY HAVE POSSIBLY IN THIS CASE WOULD BE IF YOU CONCLUDE THAT OTHER SUBCONTRACTORS WERE NEGLIGENT. IF YOU FOUND, FOR EXAMPLE, THAT SCHNABEL WAS NEGLIGENT, THE MERE FACT THAT OTHER SUBCONTRACTORS WERE ALSO NEGLIGENT WOULD NOT BE A DEFENSE SO FAR AS SCHNABEL IS CONCERNED.

ON THE OTHER HAND, THERE IS HERE A DEFENSE OF CONTRIBUTORY NEGLIGENCE. CONTRIBUTORY NEGLIGENCE IS THE CLAIM BY THE DEFENDANT THAT THE PLAINTIFF WAS NEGLIGENT AS WELL. IN OTHER WORDS, SCHNABEL IS SAYING THAT IF SCHNABEL WAS NEGLIGENT IN DESIGNING AND OPERATING AND BUILDING THIS SYSTEM, OMNI WAS ALSO NEGLIGENT. I CHARGE YOU THAT A PLAINTIFF CANNOT RECOVER—IN THIS CASE OMNI CANNOT RECOVER—IF HE WAS NEGLIGENT TOO AND IF HIS NEGLIGENCE WAS A PROXIMATE CAUSE OF THE INJURY. BUT AS I SAID TEN MINUTES AGO, ON THAT QUESTION THE DEFENDANT HAS THE BURDEN OF PROVING THAT THE PLAINTIFF'S NEGLIGENCE WAS A [894] PROXIMATE CAUSE OF THE INJURY. ON ALL THE OTHER ISSUES, THE BURDEN OF PROOF IS ON THE PLAINTIFF. BUT WHEN THE DEFENDANT SAYS THE PLAINTIFF DID SOMETHING

WRONG—THAT HE WAS NEGLIGENT—IT'S HIS BURDEN OF PROVING THAT.

NOW A COUPLE OF OTHER THINGS BEFORE WE GET TO BREACH OF WARRANTY. THE MERE FACT THAT AN ACCIDENT OCCURRED DOES NOT MEAN THAT ANY PARTY WAS NEGLIGENT. ON THE CONTRARY, THE LEGAL PRESUMPTION IS THAT REASONABLE CARE WAS EXERCISED BY EVERYBODY. THE BURDEN OF PROOF IS ON THE PARTY CHARGING THE NEGLIGENCE TO OVERCOME THIS PRESUMPTION OF DUE CARE BY A PREPONDERANCE OF THE EVIDENCE AND BY PROVING THAT NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

THE BURDEN IS ON THE PLAINTIFF TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT WAS NEGLIGENT AND THAT THIS NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE INJURY TO THE PLAINTIFF. IF THE PLAINTIFF HAS NOT FULFILLED THIS BURDEN, THE DEFENDANT IS ENTITLED TO YOUR VERDICT ON THE NEGLIGENCE CLAIM.

NOW THAT LEAVES A BRIEF STATEMENT ABOUT CONTRACT AND WARRANTY, SEPARATE FROM THE CLAIM BASED ON NEGLIGENCE. IN THIS CASE OMNI CLAIMS THAT SCHNABEL FOUNDATION BREACHED A WARRANTY CLAUSE IN THE CONTRACT. UNDER THIS CLAUSE IN THE CONTRACT, SCHNABEL FOUNDATION PROMISED THAT THE WORK IT PERFORMED WOULD BE OF GOOD QUALITY AND FREE FROM FAULTS AND DEFECTS. IF YOU FIND THAT SCHNABEL FOUNDATION MADE THIS PROMISE, THAT IT WAS RELIED [895] ON BY OMNI, THAT SCHNABEL FOUNDATION FAILED TO PERFORM WORK OF GOOD QUALITY, AND THIS FAILURE CAUSED THE DAMAGE TO THE SEARS BUILDING, THEN YOU MAY HOLD THE DEFENDANT LIABLE FOR BREACH OF CONTRACT. HOWEVER, IF YOU FIND THAT THERE WAS DAMAGE TO THE SEARS BUILDING, BUT

IT WAS NOT THE RESULT OF THE WORK PERFORMED BY SCHNABEL, YOU MAY NOT FIND SCHNABEL LIABLE FOR BREACH OF CONTRACT.

NOW I WILL JUST COMMENT A LITTLE BIT ABOUT—BRING THIS DOWN TO THE SPECIFIC FACTS OF THIS CASE, ALTHOUGH, AS I SAID AT THE OUTSET, YOU ARE NOT BOUND BY MY DESCRIPTION OF THE FACTS OR HOW THEY APPLY TO THE LAW. YOU'RE ONLY BOUND BY MY DISCUSSION OF THE LAW, BUT I WILL SAY A LITTLE BIT ABOUT THE FACTS AND HOW YOU MAY APPLY THESE INSTRUCTIONS TO THE FACTS.

IN MY VIEW WHAT MUCH OF THIS COMES DOWN TO AND WHAT YOU HAVE TO DECIDE IS WHETHER THE PLAINTIFF OMNI HAS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT SCHNABEL WAS NEGLIGENT, THAT IS, WHETHER SCHNABEL'S PERFORMANCE WAS SUCH AS TO BE BELOW THE STANDARD OF CARE AND PERFORMANCE REGARDED BY EXPERTS IN THE FIELD AS APPROPRIATE FOR A SHEETING AND SHORING SUBCONTRACTOR. IF SCHNABEL'S PERFORMANCE WAS BELOW THAT STANDARD, YOUR VERDICT SHOULD BE FOR THE PLAINTIFF OMNI UNLESS SCHNABEL HAS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT OMNI WAS ALSO NEGLIGENT. IF OMNI WAS ALSO NEGLIGENT, THAT IS, IF OMNI WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS I EXPLAINED THAT A LITTLE WHILE AGO, THEN OMNI CANNOT PREVAIL. ON THE OTHER HAND, IF OMNI PROVED [896] SCHNABEL'S NEGLIGENCE AND SCHNABEL IN TURN DID NOT PROVE OMNI'S CONTRIBUTORY NEGLIGENCE, THEN THE VERDICT MUST BE FOR THE PLAINTIFF OMNI.

OMNI IS ALSO SUING IN THE ALTERNATIVE ON THE THEORY OF BREACH OF CONTRACT AND WARRANTY. UNDER THE CONTRACT, SCHNABEL PROMISED THAT THE WORK IT PERFORMED WAS TO BE OF GOOD QUALITY AND FREE FROM FAULT AND DEFECT. HERE AGAIN

ON THE BREACH OF CONTRACT OR WARRANTY, THE BURDEN IS ON THE PLAINTIFF OMNI TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SCHNABEL BREACHED ITS OBLIGATIONS BY NOT PERFORMING WORK OF GOOD QUALITY AND FREE FROM FAULTS AND DEFECTS.

IF YOU CONCLUDE THAT OMNI HAS CARRIED THAT BURDEN, YOUR VERDICT ON THE BREACH OF CONTRACT CLAIM MUST BE FOR THE PLAINTIFF OMNI. IF OMNI HAS NOT PROVED BREACH OF CONTRACT OR WARRANTY BY A PREPONDERANCE OF THE EVIDENCE, YOUR VERDICT ON THAT CLAIM MUST BE FOR THE DEFENDANT SCHNABEL. IF YOU FIND FOR OMNI ON EITHER CLAIM—NEGLIGENCE OR WARRANTY OR ON BOTH OF THEM—OMNI WILL BE ENTITLED TO DAMAGES. IF YOU FIND FOR SCHNABEL ON BOTH OF THE CLAIMS, THEN OF COURSE THERE WILL BE NO AWARD OF DAMAGES.

NORMALLY IF YOU MAKE A FINDING IN FAVOR OF A PLAINTIFF, YOU WOULD ALSO HAVE TO DETERMINE THE AMOUNT OF THE DAMAGES. THAT IS NOT NECESSARY IN THIS CASE BECAUSE THE PARTIES HAVE STIPULATED, OR AGREED, THAT THE COST OF REPAIRS OF THE SEARS BUILDING AS A RESULT OF THE SETTLEMENT ON 601 AND PENNSYLVANIA [897] AVENUE WAS $978,208. SO IF YOUR VERDICT SHOULD BE FOR THE PLAINTIFF OMNI, THE COURT WILL AUTOMATICALLY AWARD TO OMNI THAT SUM OF $978,208. OF COURSE, AGAIN, IF YOUR VERDICT IS FOR DEFENDANT SCHNABEL THERE WILL BE NO NEED TO COMPUTE ANY DAMAGES FOR ANYBODY; THERE WILL BE NO DAMAGES.

COUNSEL COME TO THE BENCH.

(BENCH CONFERENCE AS FOLLOWS:)

THE COURT: ANYTHING I'VE SAID I SHOULDN'T HAVE SAID OR ANYTHING I LEFT OUT?

MR. WHITAKER: YOU MAY HAVE LEFT THAT OUT, YOUR HONOR. YOU SAID YOU WERE GOING TO GIVE IT YESTERDAY. I DON'T KNOW IF YOU CHANGED YOUR MIND. THAT WAS THE BURDEN OF PROOF THAT WENT WITH THE NEGLIGENCE.

THE COURT: I GUESS SO, ALTHOUGH IT ISN'T REALLY MUCH AND IT'S NEW. BUT I GUESS SO, SINCE I PROMISED.

MR. WHITAKER: OKAY. OF COURSE, I HAVE A CONTINUING OBJECTION TO THE BREACH OF CONTRACT BEING AN ISSUE IN THIS CASE AND INSOFAR AS IT TIES TO DAMAGES.

THE COURT: I STAY WITH MY PREVIOUS RULING.

ANYTHING ON THIS SIDE?

MR. KELLY: YOUR HONOR, JUST TO RENEW OUR EXCEPTION TO YOUR RULING YESTERDAY ON THE ISSUE OF STRICT LIABILITY AND THE INDEMNIFICATION INSTRUCTION.

THE COURT: I MUST BE RIGHT SINCE BOTH SIDES DISAGREE WITH ME.

[898] I AM GOING TO SEND ALL EIGHT OF THEM OUT AND EXPECT AN UNANIMOUS VERDICT ON EIGHT. RIGHT?

MR. HEGGESTAD: UNANIMOUS FROM SIX.

MR. WHITAKER: SIX. WE'LL TAKE A VERDICT FROM SIX.

THE COURT: I'M SORRY. TAKE A VERDICT FROM SIX BUT EIGHT WILL GO. I'M SORRY.

MR. HEGGESTAD: I DON'T KNOW IF THAT'S MADE CLEAR TO THE JURY BECAUSE YOU MENTIONED AN UNANIMOUS VERDICT TO BEGIN WITH.

THE COURT: I BETTER TELL THEM.

(BENCH CONFERENCE CONCLUDED.)

THE COURT: I DID FORGET TO SAY ONE THING WHICH I PROMISED COUNSEL YESTERDAY I WOULD GIVE, WHICH IS, I THINK, REALLY A REPETITION OF SOME OTHER THINGS I HAVE SAID BUT I WILL SAY IT AGAIN. PLAINTIFF IN THIS TYPE OF NEGLIGENCE ACTION AGAINST DEFENDANT HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE ON THREE ISSUES: ONE, THE STANDARD OF CARE APPLICABLE TO DESIGNING AND BUILDING EARTH RETENTION SYSTEMS; TWO, A DEVIATION FROM THAT STANDARD BY THE DEFENDANT; AND THREE, A CAUSAL RELATIONSHIP BETWEEN THAT DEVIATION AND THE INJURY OR DAMAGE CLAIMED BY THE PLAINTIFF.

NOW, NEXT YOU CAN GO AND START DELIBERATING, AND YOU DO THAT ANY WAY YOU WANT TO. I SUGGEST YOU ELECT A FOREPERSON AND THEN YOU DELIBERATE ALONG THE LINES THAT I'VE SAID TRYING, AS BEST YOU CAN, TO COME TO A VERDICT.

[899] I DID SAY EARLIER THAT YOUR VERDICT MUST BE UNANIMOUS. COUNSEL REMINDED ME THAT, UNDER THE AGREEMENT WHICH WE HAVE, YOUR VERDICT NEED NOT BE UNANIMOUS. NORMALLY IN A CIVIL CASE THERE ARE JUST SIX JURORS AND SOMETIMES WE SEND THE TWO ALTERNATE JURORS OUT AT THIS TIME. HOWEVER, BY AGREEMENT OF COUNSEL AND BY MY AGREEMENT AND MY UNDERSTANDING THE LAW PERMITTING IT, ALL EIGHT OF YOU WILL DELIBERATE, AND AS LONG AS SIX OF YOU AGREE ON A VERDICT THAT WILL BE THE VERDICT OF THE JURY EVEN IF THERE ARE TWO DISSENTERS. EVERYBODY IS EQUAL; ALL EIGHT OF YOU ARE EQUAL IN THAT RESPECT.

AS I SAID BEFORE, YOU CAN HAVE THE EXHIBITS ANY TIME YOU WANT THEM. IF YOU HAVE QUESTIONS, OF COURSE YOU MAY SEND OUT A NOTE. I AM NOT

ENCOURAGING QUESTIONS BECAUSE OFTEN THE QUESTIONS ARE TO THINGS I CAN'T ANSWER, LIKE TYPICALLY A QUESTION WILL BE WHAT DID SUCH AND SUCH WITNESS SAY. I DON'T KNOW ANY MORE THAN YOU DO WHAT THAT WITNESS SAID. WE DON'T HAVE A TRANSCRIPT. NUMBER ONE, IT HASN'T BEEN DONE YET AND NUMBER TWO, IF WE HAD IT, THE LAW DOESN'T PERMIT ME TO SEND IT IN, SO YOU WILL HAVE TO DO AS BEST YOU CAN WITH YOUR RECOLLECTION. BUT IF YOU HAVE A QUESTION THAT YOU FEEL WOULD BE HELPFUL, SEND IT OUT AND I WILL TRY TO ANSWER IT.

OTHER THAN THAT, WHEN YOU HAVE A VERDICT SEND A NOTE OUT SAYING WE HAVE A VERDICT. DON'T TELL US WHAT THE VERDICT IS; WE'LL GET THE ELEMENT OF SURPRISE BY GETTING IT IN OPEN COURT.

[900] WHAT ELSE?

MR. WHITAKER: THE SPECIAL VERDICT FORM.

THE COURT: I HAVE A FORM WHICH IS REALLY NOT VERY COMPLEX. I'LL SEND THAT IN WITH YOU JUST TO REMIND YOU THAT THERE ARE TWO PARTS TO THIS AND YOU FIND FOR THE PLAINTIFF OR THE DEFENDANT, EACH OF THEM.

I GUESS WHAT WE'LL DO IS WE'LL HAVE YOU DELIBERATE UNTIL 5:30. IF YOU HAVEN'T REACHED A VERDICT BY THEN, THEN WE'LL LET YOU GO HOME. I THINK WE'LL LET YOU GO HOME WITHOUT HAVING YOU COME BACK TO THE COURTROOM. YOU JUST GO HOME ON YOUR OWN AT 5:30. I'LL TELL THE MARSHAL TO LET YOU GO HOME, AND COME BACK ON MONDAY AT 9:45. WHEN ALL EIGHT OF YOU ARE TOGETHER IN THE JURY ROOM, YOU JUST RESUME YOUR DELIBERATIONS AT THAT TIME AUTOMATICALLY WITHOUT ANY FURTHER ADO OR INTERFERENCE FROM ME OR ANYBODY ELSE. THERE WON'T BE ANY SMOKE OR ANY

FIRE OR ANY MIRRORS OR ANYTHING LIKE THAT. YOU'LL JUST GO AHEAD AND DELIBERATE.

IS THERE ANYTHING I'VE FORGOTTEN? YES? WHAT?

MR. WHITAKER: I THINK WE BETTER APPROACH.

THE COURT: OKAY.

(BENCH CONFERENCE AS FOLLOWS:)

MR. WHITAKER: AS YOU DID WITH THE NEGLIGENCE CLAIM, YOU SAID IF THEY FIND SOMEONE ELSE WAS NEGLIGENT AND FIND THAT WE WEREN'T, I THINK THAT SIMILAR SIDE OF THE COIN IS APPLICABLE ALSO TO THE BREACH OF WARRANTY.

[901] THE COURT: I DON'T THINK SO. YOU BREACH THE WARRANTY, THE MERE FACT THAT SOMEBODY ELSE—

MR. WHITAKER: OKAY.

THE COURT: I DON'T SEE THAT.

(BENCH CONFERENCE CONCLUDED.)

THE COURT: ALL RIGHT. I THINK THAT'S IT. NOTHING NEW CAME UP.

AS I SAID, I WILL BE HERE. THEY WILL ALL BE HERE. IF THEY ARE NOT HERE, THERE IS A PLACE WHERE WE CAN FIND THEM. WE ALWAYS WANT TO HAVE THE LAWYERS HERE WHEN THERE IS A QUESTION OR CERTAINLY WHEN THERE IS A VERDICT. IF YOU DON'T GET AN ANSWER IMMEDIATELY, IT IS BECAUSE I MAY BE INVOLVED IN SOME OTHER TRIAL OR THEY MAY BE BACK IN THEIR OFFICES TALKING TO OTHER CLIENTS OR WHATEVER, BUT WE'LL GET BACK AS QUICKLY AS WE CAN.

OKAY. COURT WILL BE IN RECESS.

(COURT RECESSED AT 2:15 P.M.)

[902]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 87-2212

HARBOR INSURANCE COMPANY,
PLAINTIFF,

VS.

SCHNABEL FOUNDATION COMPANY,
DEFENDANT.

THE AMERICAN INSURANCE COMPANY,
PLAINTIFF,

VS.

SCHNABEL FOUNDATION COMPANY,
DEFENDANT.

WASHINGTON, D.C.
JULY 2, 1990
12:20 P.M.

FILED

AUG 2 1990

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

VOLUME VIII
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE HAROLD H. GREENE
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

FOR THE PLAINTIFF: ROBERT E. HEGGESTAD, ESQ.
EDWARD CANFIELD, ESQ.
RUSSELL PALATIANOS, ESQ.
JAMES KELLY, ESQ.

FOR THE DEFENDANT: ALEXANDER WHITAKER, ESQ.

OFFICIAL COURT REPORTER: LAURA M. BEASLEY
4800-F U.S. COURTHOUSE
WASHINGTON, D.C. 20001
(202) 371-1843

COMPUTER-AIDED TRANSCRIPTION OF STENOGRAPHIC NOTES

[903]

PROCEEDINGS

(JURY NOT PRESENT.)

THE COURT: THE JURY HAS A VERDICT.

(JURY PRESENT IN COURTROOM.)

THE COURT: GOOD AFTERNOON, LADIES AND GENTLEMEN.

THE JURY: GOOD AFTERNOON.

THE CLERK: WILL THE FOREPERSON OF THE JURY PLEASE RISE.

ON THE CLAIM OF NEGLIGENCE/PROFESSIONAL MALPRACTICE, DO YOU FIND FOR THE PLAINTIFF OR THE DEFENDANT?

THE FOREPERSON: THE DEFENDANT.

THE CLERK: ON THE CLAIM OF BREACH OF CONTRACT WARRANTY, DO YOU FIND FOR PLAINTIFF OR DEFENDANT?

THE FOREPERSON: THE DEFENDANT.

THE CLERK: THANK YOU VERY MUCH.

THE COURT: MAYBE YOU SHOULD POLL THEM.

LET'S SEE. ANYBODY WANT A POLL OF THE JURY?

MR. HEGGESTAD: YES, YOUR HONOR.

THE COURT: OKAY.

THE CLERK: MEMBERS OF THE JURY, YOUR FOREPERSON HAS JUST ANNOUNCED THE VERDICT. IS THAT THE VERDICT OF EACH AND EVERY ONE OF YOU?

JUROR NO. 1.

THE JUROR: YES, IT IS.

THE CLERK: NO. 2.

[904] THE JUROR: YES.

THE CLERK: 3.

THE JUROR: YES.

THE CLERK: JUROR NO. 4.

THE JUROR: YES.

THE CLERK: JUROR NO. 5.

THE JUROR: YES.

THE CLERK: JUROR NO. 6.

THE JUROR: YES.

THE CLERK: JUROR NO. 7.

THE JUROR: YES.

THE CLERK: AND JUROR NO. 8.

THE JUROR: YES.

THE CLERK: THE JURY HAS BEEN POLLED, YOUR HONOR.

THE COURT: WELL, LADIES AND GENTLEMEN, THANK YOU VERY MUCH. AS YOU HEARD—DON'T GO YET. AS YOU HEARD FROM COUNSEL, AND I WANT TO AFFIRM WHAT COUNSEL SAID, THIS WAS AS COMPLICATED A CASE, IN TERMS OF THE SUBJECT MATTER, AS WE'RE LIKELY TO HAVE. MOST OF THEM ARE EASIER THAN THIS. I'M GLAD YOU, APPARENTLY, UNDERSTOOD IT, SINCE YOU REACHED A VERDICT. SOME OF IT WAS PRETTY DIFFICULT TO UNDERSTAND, UNLESS YOU HAD A GREAT DEAL OF BACKGROUND IN CONSTRUCTION AND DIGGING AND EXCAVATION AND SOLDIER PILES. EVERYBODY PAID ATTENTION, AND YOU DID COME BACK WITH A VERDICT. SO I APPRECIATE IT. IT WAS A REAL SERVICE TO THE COMMUNITY, AND I THANK YOU. AND NOW I DON'T KNOW WHAT—

[905] THE CLERK: THEY WILL BE TAKEN TO LUNCH, YOUR HONOR, AND THEN THEY ARE REPORT TO THE JURY LOUNGE FOR FURTHER INSTRUCTIONS.

THE COURT: AS FAR AS I'M CONCERNED, YOU COULD GO HOME, BUT THEY APPARENTLY WON'T LET ME DO THAT. THANK YOU VERY MUCH.

(JURY OUT OF COURTROOM.)

THE COURT: IT WAS NICE TO HAVE YOU HERE.

MR. WHITAKER: THANK YOU.

MR. HEGGESTAD: THANK YOU.

THE COURT: I TAKE IT THAT TAKES CARE AT LEAST OF THE PROBLEMS RELATING TO ATTORNEY'S FEES AND STUFF LIKE THAT.

MR. HEGGESTAD: YES, YOUR HONOR.

THE COURT: NOW, IS THERE ANYTHING LEFT OF SOME OTHER CASE, SOMEBODY AGAINST DALY?

MR. WHITAKER: NO, YOUR HONOR. THAT IS A DECISION—IF IT IS FOR THE DEFENDANT, IT'S A DECISION AS TO ALL PARTIES AS TO ALL ISSUES. IF IT HAD BEEN FOR THE PLAINTIFF, IN ADDITION TO RESOLVING THE PENDING DAMAGE CLAIMS THERE WOULD HAVE BEEN AN EQUITABLE TRIAL OR A HEARING—

THE COURT: IS THAT YOUR UNDERSTANDING?

MR. HEGGESTAD: YES, YOUR HONOR.

MR. WHITAKER: —ON THE CROSS-CLAIMS.

THE COURT: SO I DON'T HAVE TO DO ANYTHING IS THE BOTTOM LINE.

MR. WHITAKER: FINAL JUDGMENTS AS TO ALL ISSUES, ALL [906] PARTIES.

THE COURT: THANK YOU VERY MUCH. IT WAS A PLEASURE TO HAVE YOU HERE, GENTLEMEN. ONLY

ONE SIDE COULD WIN AND ONE SIDE HAD TO LOSE, AND I FRANKLY WOULDN'T HAVE KNOWN HOW TO DECIDE IT. THANK YOU.

(THE ABOVE MATTER WAS CONCLUDED.)

APPENDIX D:

[946 F.2d 930 (D.C. Cir. 1991)]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 1991 Decided October 15, 1991

No. 90-7122

HARBOR INSURANCE COMPANY,
APPELLANT

v.

SCHNABEL FOUNDATION COMPANY, INC., ET AL.

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 87-02212)

Robert E. Heggestad, for appellant.

John C. Lynch, for appellees. *Alexander W. Whitaker* also entered an appearance for appellees.

Before: EDWARDS, RUTH B. GINSBURG and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: This diversity action arises out of a construction dispute between OMNI Construction, Inc., and Schnabel Foundation Company, one of OMNI's subcontractors. Appellant Harbor Insurance, as subrogee of OMNI, appeals from the judgment below on three grounds. Harbor contends that the district court erred in denying its motion for summary judgment based on Schnabel's strict contractual liability. Appellant also objects to the district court's truncating of its cross-examination of Schnabel's principal expert witness. Last, Harbor argues that the district court improperly denied its motion for a directed verdict on the issue of contributory negligence. Because we believe that the record was inadequate to sustain a finding of contributory negligence by a reasonable jury, we agree with Harbor that the district court should have directed a verdict in its favor on the issue of contributory negligence. We accordingly remand for a new trial.

I.

Harbor and Schnabel are disputing who is financially responsible for damage caused to an office building owned by Sears, Roebuck & Company adjacent to a construction site at 601 Pennsylvania Avenue, N.W., in Washington, D.C. The Sears building was damaged when excavation and construction activities at the 601 site caused the ground on which the Sears building stands to subside, or settle.

Westminster Investing Corporation, the owner of the 601 project, hired OMNI as its general contractor. OMNI in turn retained several subcontractors to perform various aspects of the work required to get the 601 project underway. One of them, Schnabel, was the sheeting and shoring subcontractor, whose responsibility it was to design and implement a system for protecting the walls of the excavation. The other subcontractors relevant to this appeal are Division Two, Inc., the company responsible for dewatering the excavation, and Hutchison Brothers Excavating Company, Inc., the excavation subcontractor.

While making preparations for the 601 project, Westminster had hired Schnabel Engineering Associates (SEA), a geotechnical engineering firm separate from Schnabel Foundation, to prepare reports analyzing soil conditions at the site and to recommend, among other things, a design for the sheeting and shoring of the excavation. SEA recommended "interlocking solid-steel" sheeting and shoring for the wall of the excavation next to the Sears building, a stronger system than the soldier beam and wood lagging system SEA thought adequate for the other walls. SEA also recommended that two tiers of tiebacks be used to hold the sheeting and shoring adjacent to the Sears building in place and that the system be designed to an earth retention criterion of 46H for maximum stability.

Schnabel, when it designed its system, declined to follow SEA's recommendations. Instead, Schnabel told OMNI that it proposed to use a soldier beam and wood lagging system with one tier of tiebacks and an earth retention criterion of 30H for the wall adjacent to the Sears building. Sears, concerned about the possibility of settlement, retained its own engineering consultants to evaluate Schnabel's proposed system. In June 1984, Sears transmitted the reports of its consultants to Westminster, who passed them on to OMNI. Sears' consultants noted that Schnabel had not followed SEA's recommendations, expressed reservations about the wood lagging system Schnabel had decided upon, and warned that the system could result in significant settlements.

OMNI had no design department, no engineers to do design work, and no internal capacity to undertake a technical review of sheeting and shoring recommendations. Accordingly, it sent these reports to Schnabel for its review. Schnabel responded by letter in July, disagreeing with the Sears consultants and declining to change its proposed sheeting and shoring system. Schnabel insisted to OMNI that "our system is the system required for this project and it will be installed in consideration of the Sears property."

Sheeting and shoring of the 601 excavation began several days later. Schnabel used the soldier pile and wood lagging system it had proposed, and other subcontractors began to perform their tasks, including lowering the water table at the site, placing wells, and sloping the walls of the excavation. Meanwhile, Westminster agreed to indemnify Sears for any damage caused as a result of the 601 construction, and OMNI reaffirmed in writing the obligation it had undertaken as part of the general contract to indemnify Westminster against such liability to Sears.

Unfortunately, within a month, routine monitoring of the Sears building revealed the first signs of settlement and damage. The earth had sunk slightly (about half an inch) and was moving slowly toward the excavation pit at 601 Pennsylvania Avenue. Cracks had appeared in the external walls of the Sears building. The settling continued at a steady but declining rate through the fall of 1984, and a second major settlement occurred during early November. To prevent the Sears building from collapsing, Schnabel was forced to install a system of steel braces to support the northeast corner of the building. Other remedial measures were considered, one of which was the elimination of a number of parking spaces on several levels of the 601 building, but Westminster declined to alter the garage plans. By early December, when Schnabel finished bracing the Sears building, the total settlement had reached two-and-one-half inches. After extensive negotiations, Sears, Westminster, and OMNI entered into an agreement pursuant to which OMNI performed repairs amounting to $978,000.

Harbor Insurance, OMNI's subrogee, then sued Schnabel and several other subcontractors under the law of the District of Columbia, claiming recovery under both negligence and contract theories. Harbor moved for summary judgment on the issue of Schnabel's contractual liability without fault. Harbor contended that Schnabel had agreed to assume all of OMNI's obligations to Westminster and that this included OMNI's obligation to indemnify West-

minster against liability to Sears without fault. The district judge denied the motion, finding the contract documents ambiguous. *See Harbor Ins. Co. v. Leo A. Daly Co.*, Civ. No. 87-2211, *Mem.* at 10-11 (D.D.C. Nov. 3, 1989) ("*Mem. Op.*").

The case was then put to a jury, principally on a theory of professional negligence. Schnabel raised contributory negligence as an affirmative defense. The main witnesses on both sides were construction experts who attempted to explain why the settlements had occurred and who was to blame. Edward Cording, Schnabel's principal expert, testified that the wood lagging system Schnabel employed at the 601 site was similar to that used in other comparable sites in the area. Harbor attempted to impeach Cording's testimony on cross-examination by demonstrating that Cording had no personal knowledge of these other sites and that, in any event, they were not comparable to the 601 site. The district court, however, cut off the cross-examination on the ground that it would be too time-consuming relative to its value.

After both sides rested, Harbor moved for a directed verdict on the issue of contributory negligence, arguing that Schnabel had failed to introduce sufficient evidence to justify sending this issue to the jury. The district court denied the motion, and the jury returned a verdict in Schnabel's favor. We cannot tell whether the verdict was predicated upon Schnabel's non-negligence or upon OMNI's contributory negligence, because the district court had earlier declined Schnabel's motion to submit a special interrogatory to the jury to determine the basis of a verdict in its favor. Harbor did not make a timely motion for j.n.o.v. or a new trial, but instead appealed directly to this court.

II.

A.

Harbor first challenges the district court's denial of summary judgment on the issue of Schnabel's strict con-

tractual liability. Harbor argues that the terms of the subcontract, when read in conjunction with certain provisions of the general contract, establish as a matter of law that Schnabel was bound to indemnify OMNI without regard to fault. This argument is based mainly on Article 1(b) of the subcontract, which states that "[S]ubcontractor shall assume all obligations, risks and responsibilities which OMNI has assumed towards Owner in the Contract Documents." Because OMNI assumed an obligation to indemnify Westminster without regard to fault for any property damage caused by OMNI or its subcontractors pursuant to Article 10.2.5 of the general contract, Harbor argues that Schnabel assumed the same obligation and must indemnify OMNI (and therefore Harbor) for the damage to the Sears building.

The district judge rejected this argument because he thought the contract documents were ambiguous concerning the nature of the responsibility the subcontractor owed the general contractor. *See Mem. Op.* at 6. Other provisions in the subcontract seemed to suggest that Schnabel was liable only for its negligence. The most important of these, Article 6(c), provided that Schnabel holds OMNI harmless for any property damage that is the result "in whole or in part, of negligence (or other act for which there is legal liability) of Subcontractor." The district court noted that "[a]ll of the sections of the [general] contract and subcontract which refer specifically to liability speak of negligence." *Mem. Op.* at 6. The court further observed that Harbor's reading of the contract documents would make Schnabel liable for damage even if caused by Westminster's own negligence, a result generally not permitted unless language in the contract unmistakably authorizes it. See *United States v. Seckinger,* 397 U.S. 203, 211-12 (1970). Accordingly, the district court determined that even if it were ultimately to find that the contract documents imposed strict liability on Schnabel, the contracts were sufficiently ambiguous to prevent it from making that finding on summary judgment. *See Mem. Op.* at 10-11.

We agree with the district court that summary judgment for Harbor on this issue would have been inappropriate. At minimum, the contracts were ambiguous.[1] In addition to the *Seckinger* rule of construction, we note that Article 1(b) of the subcontract was included at the insistence of the owner, not the general contractor. This provision would appear to have been intended to provide additional protection to Westminster, not to alter the allocation of liability between the subcontractor and the general. Article 6(c) of the subcontract seems to make negligence the key to that allocation.

Even if the contracts had been clear in imposing strict liability on Schnabel, moreover, summary judgment would still not seem justified. A finding of strict liability can never be made without proof of causation. No matter how strict the liability, Schnabel presumably would not have been liable had the settlement occurred due to an earthquake. Causation was an intensely disputed issue of material fact in the case, so summary judgment appears improper even on Harbor's reading of the contract.

B.

Harbor's second contention—that the district court abused its discretion in cutting off cross-examination of Schnabel's principal expert witness—is more troubling. The district court enjoys wide discretion to control cross-examination. It may disallow cross-examination that is repetitive, irrelevant, unduly prejudicial, collateral to the issues in the trial, or outside the scope of direct examina-

[1]As we have previously held, if a contract is facially ambiguous but extrinsic evidence as to the meaning of the ambiguous term demonstrates only one view is reasonable, a district judge may grant summary judgment. *See Farmland Indus. v. Grain Bd.*, 904 F.2d 732, 736 (D.C. Cir. 1990). Otherwise, the resolution of the ambiguity under District of Columbia law is for the trier of fact. *See id.; Howard University v. Best*, 484 A.2d 958, 966-67 (D.C. 1984). Appellant has not objected, however, to the manner in which the ambiguity was resolved; indeed, it is not clear to us whether it was ultimately decided by the judge or the jury.

tion. *See, e.g., United States v. Kinnard,* 465 F.2d 566, 582 (D.C. Cir. 1972). But the district court's discretion is not unlimited. Particularly where a party is seeking to impeach a witness whose credibility could have an important influence on the outcome of the trial, the district court should be cautious in limiting cross-examination. *See, e.g., United States v. Pryce,* 938 F.2d 1343, 1345 (D.C. Cir. 1991).

Here, the district court cut off cross-examination of Schnabel's principal expert witness, who testified that in his opinion Schnabel's wood lagging system satisfied the applicable standard of care. The purpose of the cross-examination was to show that Cording lacked personal knowledge of the sites he had described as comparable to the 601 project—an issue directly relevant to the weight the jury would assign to his testimony. The issue was not collateral, irrelevant, or prejudicial. The only reason given by the district court for disallowing the cross-examination was that it would be tedious and time-consuming to go through each site Cording had listed as comparable to the 601 site. That may have been so, but Harbor was entitled to pursue the line of cross-examination, and it was an abuse of discretion to prevent Harbor from proceeding.

We will reverse the district court, however, only where an incorrect decision to limit cross-examination results in prejudice to the substantial rights of the appellant. *See* FED. R. CIV. P. 61; 28 U.S.C. § 2111. Given our disposition of Harbor's final claim, we need not reach that issue.

C.

Harbor's last argument is that the district court improperly denied its motion for a directed verdict on the issue of contributory negligence. We agree. At the close of Schnabel's evidence, no reasonable jury, in our view, could have found that either Westminster or OMNI (in whose shoes Harbor stands) was contributorily negligent.

In reviewing the denial of a directed verdict, the standard we apply is the same as that applied by a district

court considering the motion in the first instance. Viewing the evidence in the light most favorable to the non-moving party, we must ask ourselves whether any reasonable jury could find in its favor. *See Klein v. District of Columbia*, 409 F.2d 164, 167 (D.C. Cir. 1969). We are entitled to consider all uncontradicted evidence offered by the moving party, as well as all evidence introduced by the non-moving party. And we must draw all reasonable inferences favorable to the party against whom the directed verdict motion has been made. *See Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159, 1161 (D.C. Cir. 1990). But a jury is entitled to draw only those inferences that are legitimate and reasonable; the court should direct a verdict where, in order to reach a verdict favorable to the non-moving party, the jury would be required to speculate or to rely on mere conjecture. *See Capital Transit Co., Inc. v. Gamble*, 160 F.2d 283, 284-85 (D.C. Cir. 1947). There must be sufficient facts and testimony in the record from which a jury could reasonably draw the inferences we attribute to it. A scintilla of evidence is not enough. *See Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1298 (D.C. Cir. 1985).

Schnabel argues, however, that in the circumstances presented, a more stringent standard of review is required under *Jones v. Reliance Ins. Co.*, 607 F.2d 1 (D.C. Cir. 1979) (per curiam). *Jones* held that where a party moves for directed verdict but fails to make a timely motion for judgment notwithstanding the verdict after the trial, "the District Court's refusal to direct a verdict is ground for a new trial only if the record reveals a complete absence of evidence to support a jury's verdict." *Id.* at 4. Because Harbor did not make a timely j.n.o.v. motion, Schnabel insists that we must apply that "complete absence of evidence" standard to the district court's denial of Harbor's directed verdict motion.

We disagree. It is not at all clear that *Jones* applies to these facts. Although the *Jones* court gave no reasons for its decision, it would seem that the rule's principal purpose is to conserve judicial resources. Where a party has

failed to move for j.n.o.v., an appellate court may not, in reversing the denial of a directed verdict, enter judgment; relief is limited to ordering a new trial. *See Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48 (1952). The *Jones* court presumably wished to provide the maximum possible incentive for a party to move for j.n.o.v., so that the appellate court could avoid ordering a new trial and instead simply enter judgment if it decided that a directed verdict should have been granted. In this case, however, Harbor could not have moved for j.n.o.v. It had only moved for a *partial* directed verdict, designed to deprive Schnabel of the defense of contributory negligence; it had not sought to have a final judgment entered in its favor.[2] Harbor could not, therefore, have renewed its motion for the court to decide the issue of contributory negligence after the jury returned its verdict—such a motion would have been pointless.

Still, *Jones* could be construed to include a party's failure to make a timely new trial motion as well. *See id.* at 3. Although providing the additional incentive to move for a new trial would not save the judicial resources required to retry the case, it would at least give the district court the opportunity to correct the alleged defect in the first instance and might therefore conserve appellate resources. Because Harbor failed to make a timely new trial motion, *Jones*' reasoning might be thought to apply here.

We decline to follow that logic, however, because we think *Jones* was wrongly decided. It stands against the vast weight of authority concerning the appropriate standard of appellate review of directed verdict motions. *See* 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2524 at 543 & cases cited in nn. 30-31 (1971 & Supp. 1991) ("The question is not whether there is liter-

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[2]Harbor did not move the district court to direct a verdict against Schnabel, because, as Harbor candidly admitted, it could not have done so in good faith given the room for reasonable disagreement concerning Schnabel's negligence.

ally no evidence supporting the party against whom the motion is directed . . . ."). The Federal Rules of Civil Procedure contain only a single standard for evaluating a motion for a directed verdict and provide no indication that a reviewing court may review under different standards a directed verdict motion that is followed by a motion for j.n.o.v. and one that is not. *See* FED. R. CIV. P. 50. Such a distinction gives rise to several anomalies. The *Jones* rule creates a *de facto* disparity between our standard of review for directed verdict motions and j.n.o.v. motions, a disparity that seems especially unjustified in light of the recent change in the Federal Rules eliminating the difference in terminology between the two. *See id.* (calling both "motion[s] for judgment as a matter of law"); *see also* C. WRIGHT & A. MILLER § 2524 at 541-42 (standard for directed verdict is the same as that for j.n.o.v.). And it in effect denies plenary review of an issue of law to a litigant who fails to make post-trial motions, even though such motions are nowhere made a condition of securing effective appellate review. *See id.* § 2536 at 595 (on directed verdict questions, "litigants are entitled to full review by the appellate court without special deference to the views of the trial court").[3] To the extent, then, that *Jones* mandates more limited appellate review of the denial of a directed verdict motion when the movant fails to move for post-verdict relief from the district court, it is hereby overruled.[4]

Applying the traditional "reasonable jury" standard, we do not think the record supports a contributory negligence finding. Schnabel argued before the jury, and reiterates before us, that either Westminster, OMNI, or both were contributorily negligent. Westminster's negligence is said to be based on its refusal to eliminate underground parking spaces and its decision to site its building only 27 feet

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[3]Furthermore, we doubt the need to add incentives to a party's obvious interest in avoiding the cost of an appeal.

[4]This opinion has been approved by the entire court and thus constitutes the law of this circuit. *See Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

from the neighboring Sears building. The question of eliminating the parking spaces did not arise, however, until after the two main settlements that caused the damage had already occurred. Whatever the wisdom of Westminster's decision, it could not have been the proximate cause of the damage—the horse was already out of the barn.

As for the siting decision, even assuming that a jury could infer that placing the new construction 27 feet from the Sears building was in some sense a cause of the settlement (we suppose it could be said that the settlement would not have occurred if the new construction were 100 feet away or on the next block), Schnabel produced no evidence that choosing 27 feet as the distance between the two buildings was unreasonable and therefore breached Westminster's duty of care. Schnabel's own expert testified, in fact, that the distance chosen was reasonable, although siting the building further away "would be even better." Transcript (Tr.) at 711. No doubt—in hindsight. But that is simply not evidence of negligence.

Moreover, it is hard to imagine how one could conclude that 27 feet would be too close to the Sears building to permit construction without regard to the type of sheeting and shoring utilized by Schnabel. If the siting was too close for the system Schnabel employed, the *proximate* cause of the settlement would not be the siting distance but instead the shoring techniques Schnabel used. After all, Schnabel worked within design parameters that included the 27 foot distance.

Schnabel also argues that the jury could reasonably have found that OMNI was negligent. Here again, Schnabel puts forth two theories. The first, which we think quite striking, is that OMNI was negligent in relying on Schnabel's own decision to use a wood lagging rather than a steel shoring system on the excavation wall adjacent to the Sears building. OMNI, we are told by Schnabel, should not have listened to Schnabel. It is certainly somewhat unorthodox for one party to a lawsuit to assert that the second party was negligent for relying on the first

party.[5] The law of the District of Columbia governs in this diversity action, and the District of Columbia Court of Appeals recently held that "as a matter of law" an architect could not be found contributorily negligent for relying on the product of the surveyor he had hired. *Bell v. Jones,* 523 A.2d 982, 997 (D.C. App. 1986). We take the D.C. Court of Appeals to imply that something of an estoppel arises when a party engages an expert and relies on the expert's advice or services. In those circumstances, if the contracting party or his subrogee sues the expert for negligence, the expert cannot blithely turn around and claim that the contracting party was negligent in retaining or listening to the expert. We think that must be so at least where the contracting party is clearly relying on the expert's special knowledge or capability.

Here, the record indicates that OMNI's unvarying practice was to rely completely on its subcontractors' expertise regarding sheeting and shoring systems. OMNI employs no architects, engineers, or designers and undertakes no technical review of sheeting and shoring systems. And any concerns third parties express over the soundness of sheeting and shoring systems are referred to the subcontractor.

To be sure, engineering consultants advised OMNI that Schnabel's proposed system was inadequate and recommended the steel system instead, but OMNI, after consulting Schnabel, who disagreed with the consultants, relied on Schnabel. And Schnabel has produced no evidence that would even suggest that OMNI, unlike the architect in *Bell v. Jones,* should not have relied on the expert with whom it had contracted. Indeed, the only testimony on this point, presented by Schnabel's own witness, was to the effect that it was standard industry practice, and therefore presumptively reasonable, for a

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[5]It reminds us of the legal definition of chutzpah: chutzpah is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan. *Cf. Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l,* 808 F.2d 76, 83 (D.C. Cir. 1987).

general contractor to rely on its subcontractors and that it was reasonable for OMNI to have relied on Schnabel's plans.

Schnabel's second theory is that OMNI was contributorily negligent in failing to supervise adequately other subcontractors whose work may have contributed to the damage. In particular, Schnabel cites Division Two's placement of a dewatering well and the demolition and sloping of the excavation by Hutchison Brothers. We have reviewed in detail all of the evidence of OMNI's supposed contributory negligence that Schnabel cited in its brief or at oral argument, but none of it is sufficient to raise an issue for the jury. The critical defect in the evidence is that none of it establishes or defines OMNI's duty of care with respect to the work of other subcontractors or demonstrates the breach of that duty. Most of the testimony relied on by Schnabel tends only to show that dewatering and excavation were contributing causes of the settlement. Even if a reasonable jury could have found that dewatering was, along with excavation, one of the proximate causes of the settlement—and the state of this proof is itself somewhat tenuous—this evidence would be insufficient as a matter of law to permit a finding that OMNI was contributorily negligent.

To be sure, as Schnabel emphasizes, OMNI, as the general contractor, did have authority to direct the subcontractors. But that the general supervises the subs is wholly insufficient to prove that the general did so in a negligent manner. Schnabel's expert, Cording, testified that "coordinating the work of the subcontractors . . . and in deciding of things such as the wells . . . are basically OMNI's responsibility." Tr. at 750. But no reasonable jury could have concluded that this meant that Cording felt OMNI had been negligent in siting the well; only a few questions earlier, he had testified, "I find it very difficult to go back after the fact and say: you should have done this. I think that decisions that were being made throughout the project by engineers and the contractor were reasonable decisions . . . ." Tr. at 749. Even OMNI's outside

expert deferred to Division Two's judgment about the location of the well, leaving OMNI with no grounds at all for questioning that judgment.

In sum, the record is devoid of evidence sufficient to warrant a finding of contributory negligence by a reasonable jury. Accordingly, we reverse and remand for a new trial.

It is so ordered.

APPENDIX E:

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-7122

September Term, 1991
CV 87-02212

Harbor Insurance Company,

Appellant

v.

Schnabel Foundation Company, Inc., et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED DEC 09 1991

CONSTANCE L. DUPRE
CLERK

BEFORE: Edwards, Ruth B. Ginsburg and Silberman, Circuit Judges

ORDER

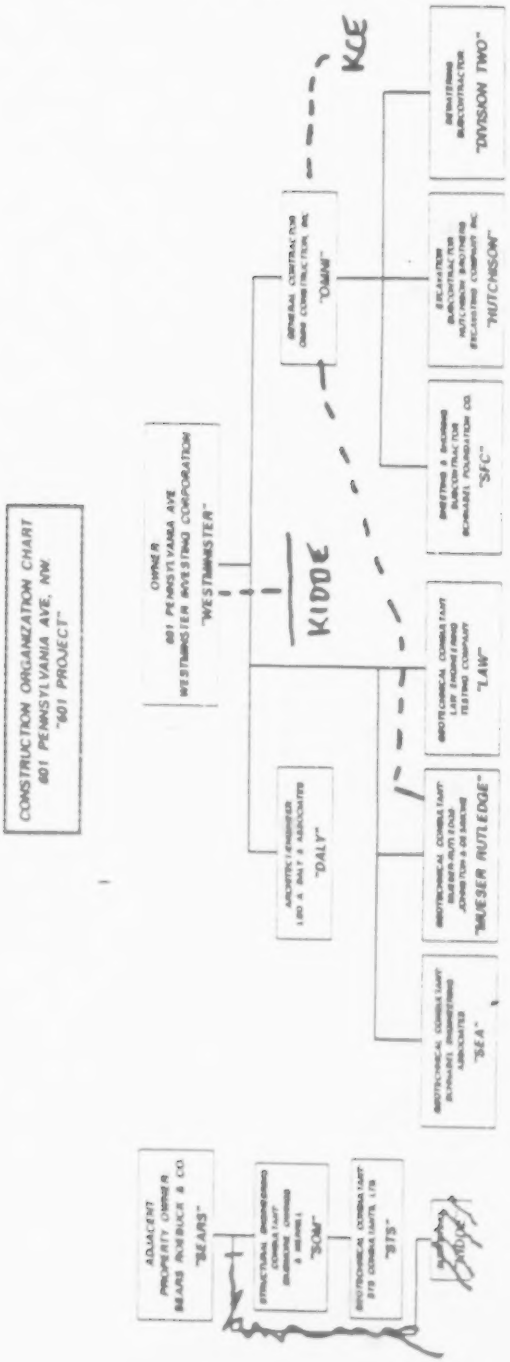
Upon consideration of appellee's petition for rehearing filed November 25, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK
BY: _____
Robert A. Bonner
Deputy Clerk

APPENDIX F:

Defendant's Exhibit No. 182



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